NO. 88-528

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term 1988

DONALD E. WILKES,

Petitioner.

—v.—

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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1. QUESTIONS FOR REVIEW

ONE: Whether this Court's **Selling**[1] decision mandates that a Federal Court find a lawyer unfit to practice as a precondition to enforcement of a State Court disbarment - a finding which was not made, and could not have been made, in Wilkes' case.

TWO: Whether a Federal Court - consistent with **Selling**, **Theard**,[2] and **Ruffalo**[3] - has power to disbar a Lawyer, derivatively, as in Wilkes' case,[4] notwithstanding that the Court, expressly, finds that the two offenses, involved, are "not very serious" - that they were committed, if at all, thirty years past - and that, as to one of them, the Lawyer was convicted on a charge neither made nor tried.

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1 **Selling v. Radford**, 243 US 46 (1917).

2 **Theard v. U.S.**, 354 US 278 (1957).

3 **In Re Ruffalo**, 390 US 544 (1968).

4 The distinction, if any, between indefinite suspension and disbarment is verbal, largely, and the terms will be treated as interchangeable, here. **In Re Fleck**, 419 F.2d 1040 (6th Cir. 1969) cert den 397 US 1074; **In Re Abrams**, 521 F.2d 1094 (3rd Cir. 1975) cert den 423 US 1038.

THREE: Whether a Lawyer, as in Wilkes' case, is denied procedural due process, per **Ruffalo**, where a Federal Court notices him to answer for offenses, specified in a State Court disbarment judgment, whereupon The Federal Court, without further notice, finds that, as to one of the offenses, he was convicted on a charge never made but upholds the conviction, nonetheless, upon the basis of a revised theory.

FOUR: Whether **Ruffalo**, supra, enjoins that a Federal Court, in a derivative disciplinary proceeding, hear the charges and proofs, de novo, as a condition upon enforcement of a State Court disbarment.

FIVE: Whether the constitutional standards, articulated in **Schware**,[5] which control State Court proceedings - having to do with admissions and punishments of attorneys-operate, equally, in Federal Court proceedings, of like nature, and therefore inhibit exclusion, or expulsion, from a Federal Court Bar except upon competent proof in the record sufficient to

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5 **Schware v. Bd. of Bar Examiners**, 353 US 232 (1957).

support a rational inference of unfitness-taking into account the age and nature of any acts of misconduct, charged - and the circumstances surrounding their commission.

2. PARTIES TO THE PROCEEDING

The United States Attorney, Middle District of Florida, Jacksonville, Division, though not named in the caption, was appointed by The Court to succeed an adversary party, Browning-Ferris Industries, Inc., in prosecution of the proceeding against Wilkes.

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3. REFERENCE TO OPINIONS

The Official Reports of Wilkes' case are:

In Re Wilkes, 201 NYS 2d 524 (1st Dept, 1960); **Florida Bar v. Wilkes**, 179 S. 2d 193 (FLA, 1965); **Florida Bar v. Wilkes**, 199 S. 2d 472 (FLA, 1967) cert den 390 US 983; **Florida Bar v. Wilkes**, 200 S. 2d 177 (FLA, 1967); **In Re Wilkes**, 494 F. 2d 472 (5th Cir. 1974); **Greer's Refuse Service and Donald E. Wilkes v. Browning-Ferris Industries, Inc.**, 782 F. 2d 918 (11th Cir, 1986); **Greer's Refuse Service and Donald E. Wilkes v. BFI, Inc.**, ___ F. 2d_____ (11th Cir, 1988)

4. STATEMENT OF JURISDICTIONAL GROUNDS

The Judgment, below, was entered April 16, 1988.

A Petition for Rehearing, in banc, was denied June 6, 1988.

28 USC 1254 confers jurisdiction on This Court.

5. STATUTES INVOLVED

The due process clauses of The Federal Constitution, as provided for in The Fifth and Fourteenth Amendments, are involved together with Local Rule 2.04(b), United States District Court, Middle District of Florida. (App-110)

6. JURISDICTION OF THE DISTRICT COURT

Jurisdiction in the Court of first instance was invoked under Local Rule 2.04(b), supra.

7. STATEMENT OF THE CASE

New York Disbarment

March 4, 1959, The New York City Bar Association charged Wilkes with three offenses viz (1) communicating with an adversary party in violation of Canon 9 (2) failure to return $600.00 to an adversary party in breach of an escrow Agreement and (3) misadvising a client as to the validity of a Mexican divorce.[6] (App-38, 54-56)

Charge 2 was preferred by an adversary party whose written complaint, further, accused Wilkes of anti-Semitism - an accusation which pervaded the ensuring Grievance Committee Hearings.[7]

June 21, 1960, The First Department disbarred Wilkes under an Order which, as to Charge 2,

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6 The March 4th Notice was limited to Charges 1 and 2. Charge 3 was served after the proceeding was in progress. (App-39)

7 The adversary party wrote a series of follow-up letters to the Grievance Committee republishing the anti-Semitism invective and assailing him for many other villainies. The record shows the Committee disavowed reliance upon such charges but tried them, anyway. (App-56,69)

convicted him of an offense neither charged, nor tried, i.e. that he had converted $600.00 of his client's funds, 201 NYS 2d 524.

Florida Suspension

In 1963, The Florida Bar began a derivative proceeding based upon the New York Judgment.[8]

Wilkes defended, arguing, among other things, that the offenses charged were minor - that, as to charge 2, he had been convicted on a charge not made - that none of them was supported by the evidence - that the proceeding was unfair for The Committee was more concerned with whether he was an anti-Semite than a professional delinquent, etc.[9]

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8 The Florida Bar refused to accept his annual dues, thus, effectively, suspending him, pendente lite, though such action, at the time, was not authorized by The Integration Rule. Wilkes moved The Supreme Court to compel acceptance. (App-76) His Motion was pigeonholed, for four years, until denied, as moot, on June 8, 1967, a month after The Court's formal suspension order was entered, April 19, 1967. **Wilkes v. The Florida Bar**, 200 S. 2d 177.

9 **In Re Wilkes**, 494 F.2d 474 (5th Cir. 1974).

At a Referee's hearing, The Florida Bar introduced a pamphlet having to do with a lecture Wilkes had given on Existentialism.

The pamphlet had the effect intended.

The Referee was inflamed.

His Report recommended sustention of all charges and disbarment - to which recommendation he superadded a ferocious denunciation of Wilkes for intellectual and religious crimes, that is; that he was not a church-goer and believed in Existentialism - a philosophy "wholly repugnant to the reputable practice of the law" which "motivated" his misconduct and rendered him unfit.[10]

The Florida Bar's Board of Governors adopted The Report, in toto.

The Florida Supreme Court reversed and remanded for reconsideration before the same Referee despite Wilkes' Motion that he be disqualified.[11]

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10 **Florida Bar v. Wilkes**, 179 S.2d p. 200-201.

11 Ibid.

Without further hearings, a second Report was published recommending that the Charge 1 and Charge 2 convictions be ratified - that Charge 3 be dismissed - and that disbarment, for five years, be ordered.[12]

The Board of Governors entered Judgment, accordingly, and The Supreme Court affirmed but for modification of the sanction to provide for indefinite suspension "until such time as...(Wilkes) shall demonstrate...he has rehabilitated himself and...should be reinstated..."[13]

Wilkes has not applied for reinstatement.[14]

Southern District Proceeding

January 23, 1950, Wilkes was admitted in The Southern District of Florida and, subsequently, was grandfathered into The Middle District.

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12 **Florida Bar v. Wilkes**, 199 So.2d 473.

13 Ibid.

14 494 F.2d 472.

In 1971, he sought to file a "Motion To Confirm Credentials" in The Middle District but on the advice of Chief Judge McRae, now deceased, withdrew the tender and brought on the Motion in The Southern District - assured that the outcome, there, would be recognized in both Districts. (App-75)

The Motion was dismissed but The Fifth Circuit reversed, ordered Wilkes reinstated, pendente lite, and remanded for a hearing, de novo on the State Court charges.[15]

A Grievance Committee studied the New York and Florida records[16] and, applying a de novo standard of review, submitted a hundred page Report, December 30, 1977, finding that "...there now exists no present basis for holding...Wilkes disqualified to practice law before the Federal Courts in this State."[17]

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15 494 F.2d 476-477.

16 Live testimony, including Wilkes', was taken, also.

17 The Report was ordered sealed for reasons unknown though Wilkes speculates that publication would have embarrassed The State Bar Authorities, most especially, New York's for allowing the proceeding, there, to be used as a forum to try Wilkes for suspected anti-Semitism. Wilkes has

The Southern District, in banc, August 10, 1978 confirmed Wilkes' Credentials. (App-100-109)

Middle District Proceeding

December 15, 1983, Browning-Ferris, Inc., an adversary party in an antitrust action, moved to disqualify and suspend Wilkes, in The Middle District, based upon his 1967 Florida Bar suspension.[18]

He submitted a copy of The Southern District's 1978 Order and pointed out that Judge McRae had vouched that the adjudication, there, would control in The Middle District, as well. (App-90-96)

Nevertheless, a Three Judge Panel convened and ordered him stricken, peremptorily. (App-77-87)

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been denied access to the Report but was able to arrange for The Southern District to offer to make it available to The Middle District Panel. The offer was declined. 782 F.2d p. 2127 n 2. The Report is exculpatory. A disbarment proceeding is quasi-criminal. **In Re Ruffalo**, supra, The Panel's action, thus trespassed the spirit, if not the letter, of **Brady**. **Brady v. Maryland**, 373 US 83. Certainly, it evinced a studied disregard for truthfinding - the talismanic search which Federal Courts are obliged to encourage in all controversies in their domain.

18 782 F.2d 2126.

The Eleventh Circuit, invoking the Fifth Circuit's prior **Wilkes** decision, as controlling precedent,[19] reversed.[20]

Wilkes was allowed, on remand, to file a "Memorandum Seeking To Show Why (...He) Should Not Be Suspended." (App-33-72)

December 23, 1986, The Panel suspended him, again, under an Order finding and concluding:

That his plea - that he did not take a client's funds - was well-founded - and, further, he was correct in asserting such a charge had never been made or tried; (App-23)

That, actually, Charge 2 was preferred by an adversary party who complained that Wilkes had refused to return $600.00 deposited with him in return for promised dismissal of a bastardy action and issuance of a general release; (App-29-31)

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19 Ibid.

20 The Middle District Panel, on remand, declined to reinstate Wilkes, pendente lite, but yielded in the aftermath of a Mandamus proceeding.

That The New York Court "simply misspoke in referring to a 'client's funds'"; (App-23)

That the other charge - having to do with Canon 9 - "stems from a letter he wrote on October 1, 1958 to the defendant who was then represented by counsel, in a personal injury action in which Wilkes represented the Plaintiff"; (App-31)

That "In all fairness", the charges involved "...offenses...(that) are just not very serious"; (App-30)

That, nonetheless, he would be suspended "until he has gained reinstatement by the Florida Bar..."[21] (App-31)

That "If he has been punished enough - and that may be a correct view of the matter - he need only apply to the Supreme Court of Florida for reinstatement." (App-28)

No finding was made as to Wilkes' fitness, vel non.

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21 The Order purging Wilkes, in The Middle District, states that he is not a "member of any organized Bar." (App-30) He is in good standing in The Southern District and in The Eleventh Circuit both of which concluded his fitness is unimpaired.

8. ARGUMENT

Question One: Fitness Factor

The Court of Appeals affirmed under an Opinion which, passing over any mention of the minor nature of his offenses, as found by The District Court, declared that "an independent determination whether Wilkes was fit to practice law" was not required - that the "obvious implication of our mandate," on first Appeal, was that such a requirement could be dispensed with unless "the record revealed...infirmities identified in **Selling**."

The Court's dialectics circumvents **Selling** in the name of **Selling**.[22]

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22 Wilkes has come to think that disciplinary proceedings are a kind of Gulag Archipelago, American-Style, and that Professional Canons are not unlike Article 58 of The Soviet Criminal Code of 1926 - an Article which, with its fourteen Sections, in Solzhenitzyn's words, has an "all-encompassing embrace" guaranteeing that "no step, thought, action or lack of action . . . (can) not be punished" - not "so much through the exact terms of its sections as in their extended dialectical interpretations." Alexander Solzhenitsyn, **The Gulag Archipelago**, p. 60 Harper & Row. A point, made again and again, by Solzhenitsyn, is that, once targeted for prosecution, an accused learned that his guilt, or innocence, of specific offenses - was irrelevant - that the aim was to compel his submission - that his alleged crimes were of no concern to the authorities but any show of independent will was - and that he was made to understand he would be caught in the toils of

Nevertheless, Wilkes' Appeal, plainly, was disposed of on a ground which poses direct conflict with **Selling's** strictures, the chief of which are:

That, in a derivative disbarment proceeding, a Federal Court's overriding concern must be to determine for itself, whether the "necessary effect of the ...(State Court) action...has been to absolutely destroy the condition of fair private and professional character, without the possession of which there could be no possible right to continue to..." practice. 243 US 50

That, accordingly, a State Court disbarment should not be recognized, derivatively, where intrinsic consideration of the record discloses "that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction that...the

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Article 58, for life, or, as long as, he resisted. That is the message Wilkes got from The Panel's Order of Suspension, December 23, 1986, and The Court of Appeal's affirmance, behind an "extended dialectical interpretation" of Selling.

conclusion on that subject" should not be accepted as "final"; 243 US 51

That a Federal Court should be mindful, in such an investigation, that a determination to disbar, or not, "must depend upon the character of the acts of misconduct and wrong relied upon, of the place of their commission and the nature of the proof relied upon to established their existence." 243 US 48-49

Selling, clearly, impressed a duty upon The District Court to determine, independently, whether the State Court charges and proofs operated to "destroy...(Wilkes') fair personal and professional character" taking into account the "character of the acts of misconduct" charged, the time and circumstance of their commission and "the nature of the proof relied upon to establish their existence."

In dispensing with such a determination, in Wilkes' case, The Court of Appeals treated **Selling** as a mere ceremonial barrier to automatic enforcement of his

State Court disbarment - satisfied by a polite, but idle, show of compliance.[23]

The decision conflicts with **Selling**, supra, and **Theard**, supra, and the decisions of the several sister Courts of Appeals which have spoken to the question.[24]

Question Two: Arbitrary and Excessive Punishment

The Eleventh Circuit, here, opaquely, but effectively, held that a District Court Panel was empowered to enforce a State Court disbarment

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23 The District Court's first Order, candidly, avowed a persuasion in favor of automatic enforcement, saying: that "the premise of Wilkes' position is that . . . (This) Court should . . . determine for itself his fitness to practice before it without regard to his current suspension in this state" - that, however, his position was not to be countenanced for "to do so would engage this Court in . . . discipline practices contrary to those . . . dictated by practicality and comity and would take this Court down a path it does not wish to follow." (App-84)

24 **In Re Thies**, 662 F.2d 774 (D.C. Cir.1980); **In Re Fleck**, supra, fn 4; **In Re Dreier**, 258 F.2d 68 (3rd Cir. 1958) **Matter of Phelps**, 637 F.2d 171 (10th Cir. 1981); **Ass'n Bar City of New York v. Isserman**, 271 F.2d 784 (2nd Cir. 1959); **In Re Braverman**, 549 F.2d 913 (4th Cir. 1976); **In Re Echeles**, 430 F.2d 347 (7th Cir. 1970); **In Re MacNeil**, 266 F.2d 167 (1st Cir. 1959); See, too, **In Re Sacher**, 347 US 388 (1954).

which, The Panel admitted, predicated nonserious offenses committed, if at all, thirty years, ago.

The decision conflicts, specifically, with **Theard**, supra and **Selling**, supra - which ordain that a Federal Court must not genuflect to a State Court disbarment - that "Disbarment being the very serious business it is..." 354 US 282- must not be decreed, derivatively, for minor offenses. 243 US 50-51.

Indeed, whether in original or derivative proceedings, Federal Courts "admit and suspend attorneys as an exercise of their inherent power"[25] applying Federal standards[26] - and the decision, in Wilkes' case, conflicts with a rule of law, governing disbarments, enshrined in generations of This Court's decisions, from **Burr**,[27] decided in 1824, to **Snyder**,[28] decided in 1985.

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25 **In Re Snyder**, 472 US 634, p. 645 n. 6.

26 Ibid.

27 **Ex Parte Burr**, 9 Wheat 529.

28 **In Re Snyder**, supra, fn 25.

This Court, for example, has admonished:

That "the profession of an attorney is of great importance to an individual..." and the "right to exercise it ought not to be lightly or capriciously taken from him" - but, contrariwise, should be treated with "great moderation" and "great caution."[29]

That an Attorney's office is not held as "a matter of grace or favor... a mere indulgence, revocable at the pleasure of the courts" - but is "...a right of which he can only be deprived...for moral or professional delinquency."[30]

That "removal from the Bar should...never be decreed where any punishment less severe...would accomplish the end desired."[31]

That the "power to disbar...can only be exercised where there has been such conduct...as shows...(an

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29 **Ex Parte Burr**, supra.

30 **Ex Parte Garland**, 71 US (4 Wall) 33.

31 **Bradley v. Fisher**, 80 US (13 Wall) 335 (1872).

attorney) to be unfit to be...(a member) of the profession."[32]

This Court, nor any Federal Court, other than The Eleventh Circuit, in Wilkes' case, has ever tolerated a Lawyer's excommunication for offenses, concededly, antique in time and "just not very serious" in nature.

The conflict is plain.

The question is important.

Question Three: Denial of Procedural Due Process

The Charge 2, made in New York, was that Wilkes refused to return $600.00 to an adversary party deposited pursuant to a letter agreement, written by the party's attorney, the terms of which purported to obligate Wilkes to dismiss a bastardy action and deliver a general release from his client.

The charge on which he was convicted, as recited in The New York Court's disbarment, was that he had misappropriated the funds from his client. (App-23)

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32 **Ex Parte Robinson**, 86 US (19 Wall) 505 (1873).

Before The Middle District Panel, Wilkes argued that his conviction on such an unmade, untried charge denied him procedural due process within the reach of **Ruffalo**.

The Panel, while admitting the New York Court "misspoke in referring to a client's funds" (App-23) did not disturb the conviction-reasoning that it should be revised to conform to the charge, actually, made - although The Court sidestepped finding that the evidence supported even that charge. (App-29-30)

The Court of Appeals confessed, too, that "the New York Court's reference to a client's funds...was...not the best choice of words" - but opined Wilkes "cannot...seriously claim he was tried on an unnoticed charge" - in that he was noticed for converting "funds transmitted to him in escrow by an opposing lawyer" - and the "record contains evidence that would support the conclusion that...(he) engaged in the misconduct charged."[33]

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33 The Court of Appeals, obviously, did not inspect the record which shows Charge 2, as made, was not proven - that the alleged escrow agreement was a fiction. (App-29) The

The District Court and The Court of Appeals, then, did not dispute that, without revision, Wilkes' Charge 2 conviction, as specified in the State Court disbarment, would not survive **Ruffalo** scrutiny since he had no notice, at all, that he was to be put on trial for taking a client's funds.

Both Courts, however, were oblivious of any **Ruffalo** problem created by sustaining the conviction, as revised, notwithstanding that the end result was, merely, a reverse replay of the State Court scenario, that is; The District Court summoned him to defend against a charge of taking a client's funds, but, without further notice, convicted him of taking an adversary party's funds.

Ruffalo forbids Federal Court recognition of a professional sanction based upon acts not specifically

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Court overlooked, too, that Charge 2 did not state cognizable misconduct. Disputes between lawyers and adversary parties are litigated and resolved in "ordinary" legal procedures," not before disciplinary bodies. Wilkes' Charge 2 prosecution was unprecedented. **People v. Finnegan**, 182 NE 792 (Ill, 1932); **In Re Schell**, 12 NYS 790 (NY, 1st Dep, 1980). Indeed, here, the adversary party sued Wilkes for conversion and lost. (App-59)

noticed before the proceeding was commenced. 390 US 551

Affirmance of Wilkes' Charge 2 conviction, patently, conflicts with **Ruffalo** and decisions of The First Circuit, in **Berkan**,[34] The Third Circuit, in **Johnson**,[35] and **Ashton**,[36] and The Tenth Circuit, in **Phelps**[37] and **Mattox**.[38]

Question Four: Entitlement to De Novo Hearing

The Southern District in banc, heard the State Court charges, de novo, in the proceeding, there, a decade ago, obedient to The Fifth Circuit's decision in **Wilkes I**.[39]

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34 **In Re Berkan**, 648 F.2d 1368 (1st Cir. 1981).

35 **Committee Professional Ethics v. Johnson**, 447 F.2d 169 (1971).

36 **In Re Ashton**, 768 F.2d 74 (1984).

37 **In Re Phelps**, 637 F.2d 171 (1981).

38 **Matter of Mattox**, 758 F.2d 1362 (1985).

39 Wilkes' case has been reviewed three times by Federal Courts of Appeal - once by The Fifth Circuit, in 1974, and twice by The Eleventh, in 1986 and 1988. Hereafter, according to chronology, they will be cited as **Wilkes I, Wilkes II**, and **Wilkes III**.

Furthermore, The Eleventh Circuit, in **Wilkes II**, cited **Wilkes I** as ruling precedent - and quoted the passage from Judge Wisdom's Opinion directing "that the district court...hold a hearing (in effect a de novo hearing) to conduct...an inquiry" - 782 F.2d 2126 - to verify, vel non, the trustworthiness of the "grounds relied on by the New York and Florida courts." 782 F.2d 2126

On remand of **Wilkes II**, he, accordingly, moved for such a hearing in The Middle District (App-74-75) - in reaction to which an Order was entered denying the relief prayed for and making plain The Panel would hear no evidence, at all, favorable to Wilkes - or, in The Order's words, no "evidence...with respect to the causes of Wilkes' suspension by The Supreme Court of Florida or with respect to rehabilitative or exculpatory matters."[40] (App-74-75)

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40 Whether **Brady**, 373 US 83, will be extended to disciplinary proceedings is debatable. But Wilkes submits it is beyond debate that the Order resonated an implacable, rather than a judicial, attitude toward him which disabled The District Court Panel to decide his fate, fairly, on the merits. **In Re Ashton**, supra, p. 80-81; **In Re Mattox**, supra, p. 1368; **In Re Berkan**, supra.

The Court of Appeals affirmed, explaining that Wilkes had misunderstood the Opinion in **Wilkes II** - that he should not have read it to mean what it, literally, said, as to de novo review.

What cannot be gainsaid, is that The Court's decision, in **Wilkes III**, conflicts with This Court's decision in **Ruffalo** as well as the decisions of The Fifth Circuit, in **Wilkes I**, and The Tenth Circuit, in **Gordon**[41] and **Phelps**, supra.

The Courts of Appeal are divided in their interpretations of the scope of review **Selling** and **Ruffalo**, in tandem, prescribe in derivative proceedings to discipline Lawyers.

Exercise of This Court's supervisory power is appropriate and needed.[42]

Question Five: Schware's Application To Federal Courts

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41 **In Re Gordon**, 640 F.2d 1143 p. 1146-47 (10th Cir. 1981).

42 **Frazier v. Heebe**, 482 US ____ (1987).

Wilkes argued, below:

That the constitutional commandments of **Schware**[43] apply in Federal, as well as State Court, proceedings to admit and expel Lawyers; (App-5-36,47)

That such commandments, thus, should be deemed to asylum him against expulsion, in The Middle District, except upon the basis of evidence in the record which "rationally justifies a finding that (he is) unfit to practice law." 353 US 246.

That the only evidence, before The Panel, bearing on his fitness, or not, was that twenty-nine years ago a New York Court convicted and disbarred him for commission of three minor offenses the most noteworthy of which was neither charged not tried - that twenty-two years, ago, The Florida Supreme Court, derivatively, convicted and suspended him on two of the charges - that ten years, ago, The Southern District - after de novo review of the State Court

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43 **Schware v. State Bd. of Bar Examiners**, supra.

charges and proofs - found him fit to practice, there - that four years, ago, he was deemed qualified and admitted to The Eleventh Circuit's Bar.

That, unarguably, such evidence precluded a rational conclusion of unfitness.

The Court did not address, explicitly, but, necessarily, decided Wilkes' argument, adversely - resulting in conflict with decisions of The Third Circuit, in **Ashton**, supra, and The Tenth Circuit, in **Mattox**, supra, holding **Schware** regnant in Federal Court proceedings.

The question is ripe for settlement.

CONCLUSION

The Middle District rubberstamped Wilkes' State Court disbarment,[44] without a finding of unfitness - indeed, under an Order containing recitals which, paradoxically, were tantamount to a finding that he is fit.

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44 **In Re Phelps**, supra, p. 176; **In Re Gordon**, supra, p. 1146-1147.

The Court of Appeals' allowance of such action conflicts with **Selling** and **Theard** and "so far departed from the accepted and usual course of judicial proceedings" as to plead for correction under the Aegis of This Court's supervisory power.

Wilkes' Petition, also, presents other important Federal law questions which, invariably, confront Federal Courts called upon to inquire into the enforceability, or not, of State Court punishments of Lawyers - questions The Courts of Appeal have not been able to agree upon, yielding a Balkanized state of affairs This Court should settle.

Above all, Federal Courts in The Eleventh Circuit, and everywhere, should be reminded that the power to disbar, even in derivative proceedings, must not be used in terrorem, but should be reserved for exercise, where necessary, as a measured response to grave misconduct subversive of character and fitness - that disbarment for non-serious offenses, always, is inappropriate and abusive - that Lawyers are not to

Federal Courts "like flies to wanton boys...who kill...(them) for their sport."

Wilkes prays for Certiorari.

Respectfully submitted,

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APPENDIX

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EXHIBIT I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO.87-3060

GREER'S REFUSE SERVICE, INC. Plaintiff,

and

DONALD E. WILKES, Appellant,

versus

BROWNING-FERRIS INDUSTRIES of Delaware,
BROWNING-FERRIS INDUSTRIES of Florida,
Defendants-appellees.

Appeal from the United States
District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTIONS(S) OF REHEARING IN BANC
(Opinion 4/26/88, 11 Cir., 1988,
____F.2d__). (June 6, 1988)

Before TJOFLAT and KRAVITCH, Circuit Judges and
TUTTLE, Senior Circuit Judge.

PER CURIAM:

( ) The Petition(s) for Rehearing of the appellant are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing in Banc are DENIED.

EXHIBIT II

GREER'S REFUSE SERV. v.
BROWNING-FERRIS INDUSTRIES

GREER'S REFUSE SERVICE,
INC., Plaintiff,
and
Donald E. Wilkes, Appellant,
v.
BROWNING-FERRIS INDUSTRIES OF
DELAWARE, Browning-Ferris Industries
of Florida, Defendants-Appellees.
No. 87-3060.

United States Court of Appeals,
Eleventh Circuit

April 26, 1988.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

In this case, the United States District Court for the Middle District of Florida, acting pursuant to its

rules, suspended attorney Donald E. Wilkes from further practice in the Middle District. We affirm.

I.

Wilkes was admitted to the Florida Bar in 1950. Upon becoming a member of that bar, he was admitted to practice in the United States District Court for the Southern District of Florida. Subsequently when the Middle District of Florida was created, he was admitted to practice in that district as well.[1] In 1953, he became a member of the New York Bar.

In 1960, Wilkes was disbarred in New York based on four charges of professional misconduct. In re Wilkes, 11 A.D.2d 35, 201 N.Y.S.2d 524 (1960).[2] In

1. The Middle District of Florida was carved from the Southern District in 1962. Wilkes, as a member of the Southern District bar, was grandfathered into the bar for the Middle District.

2. The court's opinion listed three charges: "converting and misappropriating [a] client's funds, communicating directly with a party represented by counsel in an attempt to negotiate a settlement, and misadvising and assisting a client to obtain a void Mexican divorce." Wilkes, 11 A.D.2d at 35, 201 N.Y.S.2d at 524-25. The court also remarked that Wilkes had failed to appear in the disbarment proceeding and had apparently abandoned his law practice. We interpret this remark as referring to a fourth charge of professional misconduct.

1963, on the basis of the New York disbarment, the Florida Bar initiated its own disciplinary proceedings against Wilkes. The referee assigned to the matter recommended that Wilkes be permanently disbarred, or, in the alternative, suspended until such time as the New York disbarment was vacated. On review, the Supreme Court of Florida held that the referee had erroneously given undue weight to the New york disbarment and had failed to consider whether the record of the New York proceedings supported the charges on which the disbarment was based. The supreme court therefore remanded the case to the referee, ordering him to conduct an independent examination of the record underlying the New York disbarment. Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965).

On remand, the referee gave independent consideration to the New York record and concluded that two of the four charges upon which Wilkes' disbarment had been based were not supported by the

record.[3] In light of this conclusion, the referee rescinded his earlier recommendation that Wilkes be permanently disbarred for a period of five years. The Supreme Court of Florida agreed with the referee's assessment of the New York disbarment record, but disagreed with the referee's recommendation regarding the appropriate sanction. Apparently believing that disbarment for five years was unduly harsh, the supreme court ordered that Wilkes be suspended from practice in Florida "until such time as he shall demonstrate to the Florida Bar and to this court that he has rehabilitated himself and that he should be reinstated to practice law in this state." Florida Bar v. Wilkes, 199 So.2d 472, 473 (Fla. 1967), cert.denied, 390 U.S. 983, 88 S.Ct. 1104, 19 L.Ed.2d 1280 (1968).

Wilkes has never sought reinstatement to the Florida Bar, and therefore remains suspended from the practice of Law in Florida to this day. He refuses as a matter

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3. The referee found that the third and fourth charges mentioned in the New York disbarment order, see supra note 2, were not supported by the record.

of principle to seek reinstatement to that bar; he believes that to do so would constitute a tacit admission of guilt as to the charges upon which the New York disbarment was based, and he is unwilling to make such an admission.

In September 1983, Wilkes appeared as counsel of record for a plaintiff in a case before the United States District Court for the Middle District of Florida. The defendants in the case moved the district court, pursuant to Local Rule 2.04 (b),[4] to disqualify Wilkes from serving as plaintiff's counsel and to suspend Wilkes from further practice in the Middle District. After examining the two opinions of the Supreme Court of Florida relating to Wilkes' suspension in Florida, a three-judge panel of the district court granted the

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4. Rule 2.04(b) provides that '[w]henever it appears to the Court that any member of its bar . . . has been disbarred or suspended from practice by the Supreme Court of Florida, or by any other Court of competent jurisdiction, . . . such disbarment [or] suspension . . . shall . . . operate an automatic suspension of such attorney's right to practice in this Court." The rule permits the attorney to file a petition with the district court seeking relief from the automatic suspension.

motion. On appeal, this court reversed. We held that the district court, before it could suspend Wilkes pursuant to Local Rule 2.04(b), was required "to give intrinsic consideration to the records underlying the state proceedings against Wilkes in New York and Florida." Greer's Refuse Servs., Inc. v. Browning-Ferris Indus., 782 F.2d 918, 923 (11th Cir. 1986).[5] In so

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5. We noted in Greer's that Wilkes is recognized as a member in good standing of the federal bar for the Southern District of Florida. In 1971, Wilkes filed a "Motion to Confirm Credentials" in the United States District Court for the Southern District of Florida. The court denied the motion, basing its decision on the fact that Wilkes had been suspended from the Florida bar. On appeal, the Fifth Circuit reversed and remanded, ordering the district court to conduct an intrinsic examination of the records underlying the Florida suspension. In re Wilkes, 494 F.2d 472 (5th Cir. 1974). On remand, the district court granted Wilkes' Motion to Confirm Credentials.

As we emphasized in Greer's, Wilkes' success in the Sothern District has no bearing on the merits of the present case:

> Every indication . . . is that the order of the Southern District granting Wilkes' petition to confirm credentials applied only to that district. Indeed, it could not be otherwise; for, just as every court is entitled to determine its own barmembership in terms of admission, each may also determine its barmembership in terms of suspension or disbarment as well.

Greer's, 782 F.2d at 923.

holding, we relied on the principle enunciated in Selling v. Radford, 243 U.S. 46, 37 S.Ct 377, 61 L.Ed 585 (1917), and reaffirmed in Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274, 1276, 1 L.Ed2d 1342 (1957), and In re Ruffalo, 390 U.S. 544, 547, 88 S.Ct. 1222, 1224, 20 L.Ed.2d 117 (1968). In Selling, the Supreme Court held that a federal court may rely on a state court disbarment to exclude an attorney from practice before it

> unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure, for want of notice or opportunity to be heard, was wanting in due process; 2. that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do.

Selling, 243 U.S. at 51, 37 S.Ct. at 379.

On remand, the district court examined the underlying records and concluded that neither the New York

disbarment nor the Florida suspension was infirm under the Selling standard. Accordingly, the court reinstated its order suspending Wilkes from further practice in the Middle District. The district court commented that should Wilkes gain reinstatement to the Florida Bar, he would be entitled to apply for reinstatement to the federal bar for the Middle District.[6]

II.

On appeal, Wilkes first argues that the review undertaken by the district court on remand was essentially a sham. He apparently contends that he is entitled, under our mandate in Greer's, to a trial de novo in the first instance on the question of his fitness

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6. Local Rule 2.01(b) provides that "[o]nly those persons who are members in good standing of The Florida bar shall be eligible for general admission to the bar of this Court." Local Rule 2.02 provides that, under specified conditions, a "non-resident attorney who is a member in good standing of the bar of any District Court of the United States, outside the State of Florida, may appear specially and be heard in any case in which he is counsel of record." Wilkes has not represented that he is a member in good standing of any United States district court bar outside the state of Florida.

to practice law. This argument reflects a basic misunderstanding of our mandate in Greer's.

[1] Several preliminary points are in order. First, federal district courts have clear statutory authority to promulgate rules governing the admission and conduct of the attorneys who practice before them. See Frazier v. Heebe, -- U.S. --, 107 S.Ct. 2607, 2611, 96 L.ED 2d 2607 (1987).[7] Second, the Middle District, pursuant to that authority, has promulgated rules providing that general admission to practice in that court is conditioned upon admission to the Florida Bar; these rules further provide that state disbarment may be grounds for suspension from the Middle District bar.[8]

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7. 28 U.S.C. Section 2071 (1982) provides that "all courts established by Actof Congress shall from time to time prescribe rules for the conduct of their business." 28 U.S.C. Section 1654 (1982) provides that "[i]n all courts of the United States the parties may plead and conduct their own cases ... by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cuases therein." Fed.R.Civ.P. 83 provides that "[e]ach district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with [the Federal Rules of Civil Procedure]."

8. See supra notes 4 and 6.

The Supreme court has implicitly upheld the validity of rules such as those promulgated by the Middle District. Greer's, 782 F.2d at 921.[9] As we emphasized in Greer's, a district court may suspend an attorney from its bar pursuant to a rule such as Local Rule 2.04(b) provided that an intrinsic consideration of the record underlying the predicate state disbarment does not reveal the kind of infirmities identified in Selling.

In this case, Wilkes has been admitted to practice in the Middle District based on his status as a member in good standing of the Florida Bar. The predicate of his

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9. The Supreme Court does have the prerogative to "exercise its inherent supervisory power to ensure that these local Rules are consistent with 'the principles of right and justice.'" Frazier v. Heebe, -- U.S. --, 107S.Ct. 2607, 96 L.Ed.2d 557 (1987). In Frazier, the Court exercised its supervisory power to invalidate a local rule promulgated by the United States District Court for the Eastern District of Louisiana. The rule provided that members of the Louisiana bar would not be admitted to the district court's bar unless they lived in, or maintained an office in, Louisiana. The Court emphasized, among other things, the irrationality of the rule as a means of ensuring the competence of the attorneys who practice before the district court. Id. at --, 107 S.Ct. at 2612-13. Nothing in the Frazier opinion suggests that a local rule requiring state bar membership as a condition of general admission to a district court bar is an arbitrary or irrational means of ensuring attorney competence.

suspension from practice in the Middle District was his suspension from the Florida Bar. That being the case, our mandate in Greer's directed the district court to give intrinsic consideration to the record underlying the Florida suspension and to determine whether that record revealed any of the infirmities identified in Selling. The obvious implication of our mandate was that if no such infirmities were uncovered, then it would be entirely permissible for the district court to use the Florida suspension as a predicate for its own suspension of Wilkes from practice in the Middle District. Only if the Florida suspension were found to be infirm under the Selling standard would the district court be required to make an independent determination whether Wilkes was fit to practice law.

[2] Thus, contrary to Wilkes' apparent suggestions, our mandate in Greer's did not direct the district court to conduct a de novo trial in the first instance of Wilkes' fitness to practice law. The district court, in compliance with our mandate, examined the record underlying the Florida suspension. The court found

none of the infirmities identified in Selling. Assuming that the court did not err in conducting it intrinsic consideration of the records, then, it was entirely proper for the court to reinstate its order suspending. Wilkes on the basis of Local Rule 2.04(b). Furthermore, it was entirely proper for the court to comment, consistent with its validly promulgated local rules, that Wilkes could be reinstated to the Middle District bar should he gain reinstatement to the Florida Bar.

Having disposed of Wilkes' argument that he was entitle to a trial de novo in the first instance on the question of his fitness to practice law, we turn to the merits of the district court's determination that the Florida suspension was not infirm on any of the bases identified in Selling. In making that determination, the district court gave intrinsic consideration not only to the record underlying the New York disbarment. Such

review was necessary because, as explained on the New York disbarment.[10]

Wilkes argues that the New York disbarment proceeding was constitutionally defective, and that the district court therefore erred in finding an absence of the kind of infirmity identified in Selling. One of the charges levied against Wilkes in the New York proceeding was that he had misappropriated and converted funds transmitted to him in escrow by an opposing lawyer. The record of the New York proceedings shows that Wilkes had notice of this charge and was given an opportunity to respond to it. The record also contains evidence that would support the conclusion that Wilkes had in fact engaged in the misconduct charged. The order disbarring Wilkes, however, referred to his having converted and misappropriated a "client's" funds, rather than funds

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10. Because the Florida suspension was based on only the first two charges of professional misconduct involved in the New York disbarment, see supra note 3 and accompanying text, the district court properly limited its examination of the New York record to that portion pertaining to those two charges.

transmitted to him in escrow by opposing counsel. Wilkes, 11 A.D.2d at 35, 201 N.Y.S.2d at 525. Owing to this discrepancy, Wilkes argues that he was denied due process because his disbarment was based on an unnoticed charge.

[3] We find this argument to be without merit. The misappropriation charge stemmed from Wilkes' handling of a $600 check transmitted to him by an opposing counsel. A letter accompanying the check stated that "the proceeds of this check should be held by you in escrow pending receipt by me of general release from your client to mine, and dismissal of the present action with prejudice to its renewal." No release was ever delivered by Wilkes, but he kept the money. Since the money was originally transmitted to Wilkes with the intention that it ultimately be paid to Wilkes' client, it is understandable that the New York court might make reference to the "client's funds" rather than "funds transmitted to Wilkes in escrow by opposing counsel." We recognize that the New York court's reference to a "client's funds" in describing the subject of the misappropriation was perhaps not the best choice of

words. Wilkes cannot, however, seriously claim that he was tried on an unnoticed charge merely because the description of the charge in the court's formal opinion was not a model of clarity. The fact remains that Wilkes was charged with misappropriating the funds and had adequate notice of that charge. We therefore reject Wilkes' contention that his disbarment was based on an unnoticed change.[11]

III.

In summary, we conclude that the district court's suspension of Wilkes pursuant to Local Rule 2.04(b) was proper in all respects. The district court correctly interpreted our mandate in Greer's, and we perceive no error in the court's finding that the records of the

---

11. Wilkes claims that the New York disbarment and the Florida suspension were defective in several other respects. We conclude that these additional claims do not merit discussion.

underlying disciplinary proceedings are devoid of the kind of infirmity identified in Selling.[12]

AFFIRMED

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12. In his brief, Wilkes repeatedly points out that his professional misconduct occurred some thirty years ago. Wilkes identifies this passage of time as a "grave reason," within the meaning of Selling, for not using the suspension from the Florida Bar as a predicate for suspension from practice in the Middle District.

In support of this argument, Wilkes relies on Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957). In Theard, as in this case, an attorney was suspended from a federal district court bar on the basis of a stae disbarment. The state disbarment order, entered in 1954, was based on an incident of misconduct that had occurred in 1935, at a time when the attorney was suffering from an extreme mental illness. Id. at 280, 77 S.Ct. at 1276. In light of these facts, the Supreme COurt held that the district court had erred in automatically accepting the sate disbarment as a basis for suspending the attorney, and remanded the case for reconsideration. Id. at 283, 77 S.Ct. at 1277.

The present case does not involve the kind of special circumstances that gave rise to the Court's apparent concerns Theard. In Theard, the predicate state disbarment itself occurred nearly twenty years after the misconduct in question. Here, the disciplinary proceedings that resulted in the New York disbarment were commenced within roughly one year of the misconduct in question, and the disciplinary proceedings that resulted in the Florida suspension were commenced within three years of the New York disbarment. Because the predicate state proceedings occurred in temporal proximity to the underlying misconduct, there is no danger here, as there was in Theard, that the disciplinary actions were based on stale evidence. Moreover, there is no suggestion in this case that Wilkes, like the attorney in Theard, was suffering from a debilitating mental illness at the time of the misconduct in question.

EXHIBIT III

UNITED STATE DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GREER'S REFUSE SERVICE, INC.,
Plaintiff,
-vs- CASE NO. 83-825 CIV-J-14
BROWNING-FERRIS INDUSTRIES,
INC., et al.,
Defendants.
_____/

MEMORANDUM OPINION

Donald E. Wilkes, counsel of the Plaintiff, is nor now, nor was he at the commencement of this litigation, a member in good standing of the bar of any state. On motion of the Defendants, we[1] entered an order on April 9, 1985, disqualifying Wilkes from affording representation in this case and suspending him from further practice in the Middle District of Florida.

---

1. A three judge panel was convened pursuant to Tule 2.04, M.D. Fla. Rules.

On appeal, the Court of Appeals reversed and remanded with directions that this Court give "intrinsic consideration"[2] to the underlying records in the state courts disciplinary proceedings which resulted in Wilkes' disbarment and suspension from practice, respectively, in New York and Florida -- the two states in which he was previously admitted to practice. Greer's Refuse Services, Inc. v. Browning-Ferris Industries of Delaware (Appeal of Donald E. Wilkes), 782 F.2d 918 (11th Cir. 1986).

I.

The record filed by the Florida Bar discloses that Donald E. Wilkes was born on March 10, 1922 in Ocala, and is now 64 years of age. He attended Auburn University from 1940 until 1942, and spent three years in the Army during World War II. He returned to Auburn after the war and then transferred to Stetson University where he obtained his B.A. degree. He then

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2. See, Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585 (1917).

enrolled in Stetson Law School but transferred to the University of Florida College of Law where he obtained his LL.B. degree and was admitted to the Florida Bar in 1949 pursuant to the diploma privilege. He apparently served an abbreviated clerkship with United States Circuit Judge Curtis L. Waller of Tallahassee until Judge Waller's death in July of 1950, after which he became associated with the firm of Cravath, Swain & Moore in New York form 1950 through 1955. In 1956 he became associated with then Senator Claude Pepper in Miami; and, in 1957, he returned to New York city and formed the firm known as Wilkes, Kennedy & Fields. His trouble with the Bar began in 1959 (See report of Referee of the Florida Bar dated March 3, 1964).

On March 4, 1959 Mr. Wilkes was notified by letter from the Committee on Grievances of the Association of the Bar of the City of New York that proceedings would be undertaken to determine two charge of professional misconduct made against him. Those charges were: (1) that he had improperly addressed a direct communication to an opposing party who was then be represented by independent counsel; and (2) that he had

misappropriated $600 held by him in escrow. Extensive hearings were conducted during the period March - June, 1959. Mr. Wilkes appeared and represented himself during the hearings. (The transcripts are a part of the record filed by the Florida Bar.) The Committee's findings were adverse and represented himself during the hearings. (The transcripts are a part of the record filed by the Florida Bar.) The Committee's finding were adverse to Wilkes and in November, 1959 a disbarment proceeding commenced before a referee appointed by the Supreme Court of New York, Appellate Division, First Department. (The transcript of those proceedings is also a part of the record.) Although he had received notice of the disbarment proceedings, Wilkes did not attend. It appears that he was in the midst of a marital quarrel and had left his home in New York so that his whereabouts were unknown. Even so, he was represented at the hearing by a lawyer employed by his wife and his law partner.

On June 21, 1960, the Supreme Court of New York, Appellate Division, First Department entered its Order

disbarring Wilkes from the practice of law. In Re Donald W. Wilkes, 201 N.Y.S.2d 524 (1960). The Court recited that the charges against Wilkes were "...converting and misappropriating [a] client's funds,[3] communicating directly with a party represented by counsel in an attempt to negotiate a settlement, and misadvising and assisting a client to obtain a void Mexican divorce." Id at 524-525. The Court also remarked that Wilkes had failed to appear and had apparently abandoned his law practice.

II.

In 1963, disciplinary proceedings were initiated against Wilkes by The Florida Bar predicated upon the New York disbarment. Hearings were conducted before a

---

3. The Court simply misspoke in referring to a "client's funds." The charge, and the evidence adduced to support it, was to the effect that Wilkes misappropriated funds transmitted to him in escrow by an opposing lawyer.

referee who file a written report commending that Wilkes be disbarred or, alternatively, that he be suspended until such time as the New York order of disbarment should be vacated and set aside. (A copy of the Referee's report, dated March 3, 1964, is included in the record.)

On review by the Supreme Court of Florida, the court held that the Referee had placed undue, conclusive weight upon the New York finding of guilt and assessment of discipline, and the proceeding was remanded for an independent determination of those issues. The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965).

On remand, the Bar Referee gave independent consideration to the record of the New York disciplinary proceedings, as well as the proceedings he had previously conducted, and then made a new report and recommendation. He found that the first two charges alleged against Wilkes in New York (misappropriating escrow funds and communicating directly with an opposing party) were established by the record; but that the third charge mentioned in the New York Order of

Disbarment (misadvising a client as to the validity of a Mexican divorce) was not supported by record. Similarly, the Referee found that the fourth charge (abandoning his law practice) could not be sustained because the respondent had attended all of the proceedings before the Grievance Committee in New York, a fact that was either overlooked by, or was unknown to, the New York Court. Accordingly, the Referee on this occasion recommended that, rather than permanent disbarment, Wilkes should be disbarred for a limited period of five years beginning from the date in 1963 when the Florida Bar proceedings commenced. (Referee's report date May 2, 1966).

On review, the Supreme Court of Florida affirmed the Referee's finding the that the New York record supported a finding of guilt with regard to the misappropriation and direct communication charges, but the Court disagreed that disbarment for five years was an appropriate discipline. Rather, the Court ordered that Wilkes should merely be suspended from all practice of law "... until such time as he shall demonstrate to the Florida Bar and to this Court that

he has rehabilitated himself and that he should be reinstated to practice law in this State." The Florida Bar v. Wilkes, 199 So.2d 472, 473 (Fla. 1967).

To this day, Wilkes has never applied for reinstatement as a member in good standing of the Florida bar. He justifies this failure on the apparent basis that to apply for reinstatement would constitute a tacit admission of original guilt, and this he refuses to do.

III.

On August 6, 1971 Wilkes filed in the Southern District of Florida a "Motion to Confirm Credentials to Practice Before the Courts of the Southern District." The motion was assigned to Judge Mehrtens and treated by him as a motion for reinstatement. The Court then abstained from ruling on the motion until such time as Wilkes filed a petition for reinstatement in the Florida Supreme Court. On appeal, the Fifth Circuit reversed and remanded for further proceedings. Specifically, the Court of Appeals ordered the District Court to determine for itself whether Wilkes should be permitted

to practice before it, such determination to be made on the bases of an "intrinsic consideration" of the proceedings in New York and Florida as dictated by the U.S. Supreme Court decision in Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585 (1917). See In Re Wilkes, 494 F.2d 472 (5th Cir. 1974).

When the matter reached the Southern District on remand from the Fifth Circuit, Wilkes' petition was referred to the Court's Grievance Committee for a recommendation. The Grievance Committee ultimately reported as follows:

> Under all the circumstanced surrounding the charges and all the evidence concerning them, the permanent disbarment of Wilkes is a more severe punishment than Wilkes' misconduct justified, and that as of this time he has been disciplined enough.
>
> Recognizing that Mr. Wilkes, in the last seventeen years, has suffered sever sanction, and without in any way approving Mr. Wilkes' conduct, and indeed, conceding that such conduct was censorable, we believe there now exists no present basis for holding Mr. Wilkes disqualified from continuing to practice law before the Federal Courts in this State (pp. 101-02).

Acting on that recommendation the Judges of the Southern District entered an Order on August 2, 1978 granting Wilkes' "Petition to Confirm Credentials."

Parenthetically, we would note to our own view that the Grievance Committee in the Southern District exceeded its proper charge and went beyond "intrinsic consideration" of the New York and Florida disciplinary proceedings. It did not confine itself to the question whether those records justified the discipline administered; and, indeed, the Committee overstated the severity of the discipline imposed by the Supreme Court of Florida. Wilkes was not "permanently disbarred" in Florida; he was merely given an indefinite suspension.[4] If he has been punished enough -- and that may be a correct view of the matter -- he need only apply to the Supreme Court of Florida for reinstatement.

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4. In his belief before this Court Wilkes asserts that his indefinite suspension was unduly harsh and was more severe than the discipline administered by the Supreme Court of Florida in other similar cases. A reading of the Court's opinion, however, makes it abundantly clear that in rejecting the referee's recommendation of a definite period of disbarment in favor of an indefinite period of suspension, the Court intended to mitigate not enhance the discipline, and it chose suspension in order to allow Wilkes the immediate opportunity to petition for reinstatement. See The Florida bar v. Wilkes, 199 So.2d 472, 473 (Fla. 1967).

IV.

Our present chore in the Middle District of Florida, pursuant to the mandate in Greer's Refuse Service, Inc. v. Browning-Ferris Industries of Delaware (Appeal of Donald E. Wilkes), 782 F.2d 918 (11th Cir. 1986), is to give "intrinsic consideration" to the proceedings in New York and in Florida to determine: (1) Whether Wilkes in those State proceedings was afforded due process in terms of notice and an opportunity to be heard; (2) Whether there was "such an infirmity of proof" that the conclusion reached by the State cannot be accepted; and/or (3) Whether there is some other "grave reason" why the State Court result should not be accepted. See also Selling v. Bradford, supra.

Clearly, from our review of the record, none of those three factors exist in this case.

The first charge against Wilkes (misappropriation of escrow funds) stems from a letter written to him by an opposing lawyer on August 20, 1958. By that letter the opposing lawyer transmitted his client's check in the amount of $600 which was tendered in settlement of a pending case. The letter specifically declared that "the

proceeds of this check should be held by you in escrow pending receipt by me of a general release from your client to mine, and dismissal of the present action with prejudice to its renewal." The release was not delivered, but Wilkes kept the $600 anyway. he seeks to explain and excuse this conduct on the ground that the letter varied the terms of an earlier telephone conversation he had with opposing counsel, and/or on the basis of a convoluted argument that subsequent develops in the case justified his retention of those funds as his fee.

The second charge against Wilkes (direct communication with an opposing client) stems from a letter he wrote on October 1, 1958 to the defendant, who was then represented by counsel, in a personal injury action in which Wilkes represented the Plaintiff.

In all fairness, These offenses, considering all of the circumstances surrounding their commission, are just not very serious. Over twenty years of disbarment and/or suspension should be enough, assuming that the offender has otherwise lived an exemplary life. But the fact remains that he is not a member of any organized Bar;

that he was appropriately disbarred and/or suspended by the Bars of which he was a former member; and that "intrinsic consideration" of those proceedings confirms that appropriateness of the disciplinary actions taken at that time.[5]

It follows that Wilkes should be, and is hereby, suspended from the practice of law before this Court until he has gained reinstatement by the Florida Bar (or until such time as reinstatement has been sought and unjustly denited).

IT IS SO ORDERED this 23 day of December, 1986.

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5. In Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274 (1957) the Court disapproved of reliance by a federal district court upon a state disbarment proceedings which occurred in 1954 based upon wrongful behavior that had occurred almost twenty years earlier in 1935 at a time when the subject lawyer was mentally irresponsible. This case is clearly distinguishable. There is no staleness or other infirmity in the state court proceedings resulting in Wilkes suspension, and there is no "grave reason" why the state court judgment should not be honored.

IT IS SO ORDERED this 23 day of December, 1986.

WM. TERRELL HODGES
CHIEF UNITED STATES DISTRICT JUDGE

HOWELL W. MELTON
UNITED STATES DISTRICT JUDGE

SUSAN H. BLACK
UNITED STATES DISTRICT JUDGE

EXHIBIT IV

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GREER'S REFUSE SERVICE, INC.,
Plaintiff,
vs. CASE NO. 83-825-Civ-J-14
BROWNING-FERRIS INDUSTRIES, INC., et al.,
Defendants.

MEMORANDUM SEEKING TO SHOW CAUSE WHY WILKES SHOULD NOT BE SUSPENDED

The June 19th Order provided that Wilkes should "show cause, by written pleading or memorandum, why this Court should not, by reason of the three factors ..." -- enumerated in Radford[1] -- "suspend him from

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1. Selling v. Radford, 243 US 46, 37 SCT 377, 61 L.Ed. 585 (1917).

further practice of law before this Court due to his previous suspension from practice by the Supreme Court of Florida..."

Radford[2] instructs Federal Courts not to enforce State Court disciplinary actions where "1...the state procedure, from want of notice or opportunity to be heard, was wanting in due process 2...there was such an infirmity of proof as to fats found to have established the want of fair private and professional character as to give rise to a clear conviction..." that the "conclusion" should not be accepted "as final" or 3..."some other grave reason existed" which "would conflict with the duty...not to disbar except upon the conviction that under the principles of right and justice..."such action is "constrained."

This Memorandum is tendered in compliance with the June 19th Order.

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2. Ibid.

Background of

State Proceeding

The New York charges had to do with events that took place, in 1958, and the proceeding itself, was commenced, officially, March 4, 1959.

It was a near-antediluvian period in the evolution of the constitutional rights which have come to shelter the practice of law -- rights which lawyers, now, take for granted.

Prior to Schware,[3] admission to the practice of law was deemed a privilege granted by grace of The Sovereign and subject to summary revocation on terms and conditions agreeable to The Sovereign's will, only.

Schware's[4] announcement, May 6, 1957, was the beginning of a new direction, holding:

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3. Schware v. Bd. of Bar Examiners of New Mexico, 353 US 232, 77 SCT 752, 1 L.Ed2d 796 (1957).
4. Ibid.

That a State cannot exclude a person from the practice of law...in a manner or for reasons that contravene the Due Process or Equal Protection Clause";

That exclusion must be founded on evidence in the record sufficient to warrant a finding of unfitness;

That such a finding is not tolerable unless it takes "into account" the "nature of an offense";

That there must be a rational basis for imputation of bad character;

That allowance must be made for the age of the acts of misconduct, charged -- and the circumstances of their commission.

Schware, then, was a watershed in lawyers' rights but too recent in vintage and novel in doctrine to influence the conduct of New York's Bar authorities in Wilkes' prosecution.

It was not until 1963, in Willner,[5] that The Supreme Court rebuked them for their indifference to procedural

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5. Willner v. Comm. on Character and Fitness, Appellate Division of The Supreme Court of New York, 373 US96, 83 SCT 1175, 10 L.Ed2d 224 (1963).

procedural due process in investigating and judging professional fitness.[6]

Wilkes thinks that a fair reader of The New York record will conclude that what happened to him could not happen to a lawyer in the consitutional climate of the 1980's.

New York Record

The New York record consist of the transcript of the several Grievance Committee Hearings -- running to 426 pages -- and the transcript of an ensuing trial before a Referee -- running to 100 pages.

It is, Wilkes thinks, important to take note that The Referee declined to consider The Grievance Committee transcript notwithstanding that Wilkes' cause was before him pursuant to The Committee's reference. (GCT-87)

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6. Willner's foe was The Admissions Committee created by The Appellate Division of The Supreme Court of New York, First Judicial Department. The same Court, hereafter, sometimes, called The First Department, created The Grievance Committee that heard Wilkes' case.

It is notable, too, that The First Department's disbarment order was entered without benefit of The Committee transcript.

New York Record Designations

The Committee transcript will be referred to by the symbols GCT followed by the page number.

The Referee's transcript will be designated RT followed by the page number.

New York Charges

Two charges were preferred in The Grievance Committee's Notice, dated March 4, 1959.

Charge No. 1 was that Wilkes had communicated with an adversary party, represented by counsel, in violation of Canon 9.

Charge No. 2 was that an adversary party had deposited $600.00, in escrow -- that he had not performed the duties imposed under the escrow agreement -- and that he had "failed to return any part of the $600.00 ...and...(had) converted it to...(his) own use."

Charge No. 3, served when he attended a hearing on the original charges, was the had misadvised a client as to the validity of a Mexican divorce.

Organization of This Memorandum

The Florida Supreme Court, ultimately, acquitted Wilkes on Charge No. 3 and it will be passed over, here,

His conviction on Charges 1 and 2 will be taken up, in order, for purposes of Radford -- analysis, viz to inquire into whether they are unworthy of This Court's acceptance because of (1) want of notice incompatible with procedural due process (2) infirmity of proof of (3) "other grave reason..."

CHARGE 1

Grievance Committee Hearing

Facts

The Grievance Committee transcripts shows:

That Wilkes succeeded another Lawyer in representing a pedestrian knocked-down by a motorist in an intersection; (GCT-17-19)

That the Attorney, who represented the motorist's insurer, Liberty Mutual, refused to disclose the Insured's address and, arbitrarily, revoked a settlement offer made to Wilkes' predecessor; (GCT-18-20)

That Wilkes' client claimed -- and medical opinion confirmed -- that a mid-term miscarriage was caused by the accident; (GCT-52-57)

That, after considerable exertion Wilkes tracked down the motorist and brought suit; (GCT-20)

That, subsequently, he wrote asking that she demand her insurer pay the policy limit -- $10,000.00 -- lest she be exposed to liability for judgment in an amount in excess of the limit -- considering the nature of her victim's special injuries, i.e. the miscarriage; (GCT-8-9, victim's special injuries, i.e. the miscarriage; (GCT-8-9, 52-60

That, simultaneously, Wilkes mailed a copy of the letter to the motorist's attorney employed by Liberty Mutual to represent her; (GCT-25)

That the controversy proceeded to trial and a jury verdict rendered for the motorist; (GCT-5)

That the Insurer's Attorneys complained against Wilkes to the Grievance Committee asserting a Canon 9 violation;

That Wilkes' defense, presented during the Committee hearings, was that, on the facts, his letter did not violate the Canon (GCT-7) that he sought to lay the predicate for an excess liability claim against the insurer in the event it declined to settle for the policy limit after demand by the Insured (GCT-9-24) that a communication, for such purpose, was permissible (GCT-9-24) that, as to any excess exposure, in insured is not represented by an insurer's Lawyers (GCT-9-24) and that, accordingly, a Plaintiff's Lawyer may communicate with the insured to recommend that the insured seek the advise of independent counsel in regard to such exposure. (GCT-9-24)

Trial Before New York Referee

The transcript of the trial before the New York Referee shows:

That only Charge 1 witness was Keane, Liberty Mutual's lawyer;

That he testified the Wilkes had written the disputed letter; (RT-30-31)

That he admitted Wilkes had sent him a copy as the insured's lawyer; (RT-30)

That he conceded, too, that the letter had not persuaded the insured to pursue a course of action contrary to the insurer's interests -- that "within a week she called up and said she would follow whatever we did";(RT-29-30)

CHARGE 1 LAW

Wilkes contends that "infirmity of proof" and "other grave reason" -- within the meaning of Radford -- militate against enforcement of his Charge 1 conviction.

Infirmity of Proof

No evidence, at all, was introduced showing the letter, in dispute, violated Canon 9 except Keane's testimony that he had been working for insurers twenty-five years and had never "seen a letter like that." (GCT-70)

Nor did the prosecutor cite cases or authorities tending to establish a violation.

Wilkes, contradistinctively, produced, read into the record and introduced into evidence articles from legal publications the tenor of which was that his letter was blameless; (GCT-9-11; 13-17; 22-24)

They demonstrated that some experts, in the field, were convinced that "The restriction upon the right of the insured to settle the claim does not apply to a settlement of...potential excess liability" -- that "To this extent he has a right to protect himself; (GCT-23)

The articles, moreover, documented that The American Bar Association had declined to issue a "ruling on the ethical propriety of communicating directly with the insured" in such a situation.(GCT-24)

At the time of his 1959 Trial, indeed, there, apparently, was no New York case in point, even tangentially, except Re O'Neil[7] in which an insurer's

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7. Re O'Neil, 239 NYS 297 (1st Dept., 1930).

lawyer was exonerated on a Canon 9 charge that he had approached and negotiated settlement with claimants represented by counsel.

The First Department found the settlements had taken place and were improper but concluded they were the work of the lawyer's underlings -- of which he had no specific knowledge.

But Re O'Neil did not speak to the propriety of a letter, like Wilkes; advising an insured to enlist independent counsel for protection against contingent, excess liability.

Even Keane, Liberty Mutual' lawyer, testified, before The Grievance Committee, that an insurer has a duty to inform as to such a contingency -- and that, accordingly, "on June 19, 1958 a letter was sent to the assured notifying her of the excess addendum...and that the coverage was considerable less,...(and) inviting her to get her own counsel and associate with me in the trial of this case." (GCT-67-69)

Wilkes' spontaneous response was: "May I comment that is a splendid thing to do and that is what all insurers should do." (GCT-69)

But it must be remembered that, pre-litigation, Keane's associate, Holden, had refused to give the insured's address to Wilkes, or, in the alternative, "to communicate to her the fact that...(Wilkes) wanted to discuss settlement." (GCT-18-19)

It was not irrational, then, for Wilkes to assume that the insured would not learn of her rights unless he informed her.

In brief, at the time he wrote the October 1, 1959 letter, made the subject of Charge 1, there was no New York case which could be construed as a precedent for Wilkes' Charge 1 Canon 9 conviction.[8]

Oppositely, all the persuasive authorities were to the effect that such a letter, written to prepare the way

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8. In 1976, in LaCava, 385 NYS2d 642, New York's Fourth Department rejected an argument somewhat like, but not the same as, Wilkes made in 1959. The LaCava facts, moreover, were aggravated. The lawyer, or his agent, secured an affidavit from an adversary party represented by counsel. The lawyer contended he had "an implied right to take . . . (the) statement by virtue of his representation of both parties in varying matters" -- and that, in any event, "opposing counsel only represented affiant's insurance carrier."

for an excess liability claim against an intransigent insurer, was not unethical.[9]

Wilkes' Charge 1 conviction was arbitrary and a fortiori infirm in proof.

"Other Grave Reason"
Why Charge 1 Should
Not Be Recognized

Radford's[10] "other grave reason: component enjoins Federal Courts to refuse to adhere to State Court disbarments, or suspensions, where adherence would "conflict with the duty" not to disbar unless "constrained" to do so under "the principles of right and justice."

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9. Canon 9 is, now, DR 7-104(A)(1). A significant accompanying revision allows for communication with an adversary party, represented by counsel, where "authorized by law . . . ." The purpose of the prohibition, past and present, is not clear. The ABA's only explanation is that the legal system "functions best when persons in need of legal advise or assistance are represented by their own counsel." ABA Annotated Code of Professional Responsibility, 1979, page 332. If such be the purpose Wilke's letter was not an infringement. he sought to enable the insured to have the benefit of her "own counsel" as to her excess exposure. She was not, to that extent, represented, at all.

10. Selling v. Radford, supra, fn 1.

Does an ancient, Canon 9 violation, assuming its validity, warrant striking Wilkes from The Roll of Attorneys?

Would the punishment be so disproportionate as to pose "conflict...(of) duty" as contemplated by Radford?

Wilkes thinks it would -- and, further, that conflict with Schware's[11] strictures would arise -- strictures which denounce exclusion from the practice of law unless the "nature of the offense" is taken into account -- and is shown to be so malignant as to support a rational inference of bad character.

Usually a Canon 9 violation -- now DR 7-104(A)(1) -- is punished by censure, reprimand or short term suspension.[12]

There are four Florida cases that furnish guidance in appraising "the nature of the offense" and the appropriate measure of punishment.

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11. Schware v. Bd. Bar Examiners, supra, fn 3.
12. Selling v. Radford, supra, fn. 1.

In LeFave,[13] where the charge was a violation of DR 7-104(A)(1), without more, a public reprimand was ordered.

In Shapiro,[14] where a DR 7-104(A)(1) count was conjoined with five others -- having to do with commingling of clients' funds, insanity etc. -- and a written plea of guilty, as charged, was entered, except

13. Florida Bar v. LeFave, 409 So.2d 1025 (1982).
14. Florida Bar v. Shapiro, 413 So.2d 1184 (1982).

as to the insanity count, the sanction imposed was suspension for three months and a day.[15]

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15. New York's First Department enforced Florida's Shapiro sanction because he had not contested guilt (455 NYS2d 604). But, ironically, under the Aegis of The Florida Supreme Court's original decision, in Wilkes' cause, (179 So.2d 193) The new York Court of Appeals, per curiam, declined enforcement of a Florida disbarment following upon a sodomy conviction. In Re Kimball, 301 NE 2d 436 (1973) The Court adopted the opinion of the Dissenters, below, (339 NYS 2d 302) who posited that full-faith and credit nor comity enjoined New york to "blindly follow" the Florida adjudication -- that "differing conditions" of place, time and social and moral climate" in new York, in 1973, dictated an appraisal of fitness contrary to Florida's made in 1957. The Wilkes pronouncement has had a salutary influence in repropagating Radford's principles in derivative disciplinary proceedings among State Courts. The Missouri Supreme Court, en hanc, in Weiner, 530 SW2d 222 (1975), expressly, adopted Wilkes as the benchmark in such a proceeding. Kentucky's Highest Court did the same in Signer, 553 SW 2d 534 (1966), saying that automatic acceptance of another state's disciplinary adjudication would oust a domestic state's jurisdiction to decide for itself, the fitness, vel non, of a lawyer. Even New York's First Department has been converted. When Wilkes was on trial, in Florida, The Department's agents inveighed that his disbarment, there, should be enforced, automatically, in Florida -- that otherwise, the public weal would be subverted. The Department, in an about face, has codified Radford (455 NYS2d p. 605). In a nub, Wilkes has not been a refuge for soundrels. It has has a leavening and healing power. Rubber stamp judgments, now, are disfavored. State Courts, like Federal Courts, are enabled to do rational justice in derivative proceedings.

In Kirtz,[16] two proceedings, prosecuted simultaneously, laid a DR 7-104(A)(1) charge and five more -- among them exaction of an excessive fee, neglecting a client's affairs, fraud and deceit, etc.

Guilt was confessed.

Suspension, for four months, was ordered in both proceedings, to run concurrently.

In Suprina,[17] the Complaint was in six counts - i.e. violation of DR 7-104(A)(1), mishandling of trust funds, improper record keeping, etc.

The Referee convicted on all counts.

Suprina was ordered to "appear before the Board of Governors of The Florida Bar to receive a public reprimand."

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16. Florida Bar v. Kirtz, 445 So.2d 576 (1984).
17. Florida Bar v. Suprina, 468 So.2d 988 (1985).

Judicial Attitude Evidenced by Florida Cases

The quartet of cases, canvassed above, contains the whole corpus of Florida law on Canon 9, or DR 7-104(A)(1), violations.

Plainly, the judicial attitude they express is tolerant, if not quite permissive.

The establish that Wilkes' indefinite suspension, by The Florida Supreme Court, for such violation, was unprecedented - and so discriminatory as to excite suspicion about intrusion of unspoken, extra-judicial considerations.

Canon 9 Violations
Does Not Authorize
Wilkes' Suspension
By This Court

In Theard,[18] Mr. Justice Frankfurter, was appalled that a District Court had enforced, automatically, a State Court disbarment for a time-encrusted wrong.

In his words, "We do not think that 'the principles of right and justice' require a federal court to enforce disbarment of a man eighteen years after he had uttered a forgery when concededly he was 'suffering under an exceedingly abnormal condition some degree of insanity'. Neither considerations relating to 'the law of the case;...nor the temptation to get bogged down in the quagmire of controversy about the McNaghten rule, require automatic acceptance by a federal court of the state disbarment in the circumstances of this case. The

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18. Theard v. U.S., 354 US 278, 77SCT 1274, 1 L.Ed2d 134 (1957).

District Court apparently felt itself so bound. This we deem error."

Wilkes' asserted Canon 9 entanglement is twenty-eight years old.

If proven, originally, which Wilkes denies, it would have constituted a minor offense, at best - warranting reprimand, at worst.

Staleness has extinguished it, entirely.

This Court should treat it as undeserving of notice.

Summary Review of

Wilkes' Charge 1 Conditions

No action should be taken against Wilkes on Charge 1.

Intrinsic consideration of the New York record shows that his conviction, on that charge, was not supported by competent evidence in the record - and, therefore, "infirmity of proof" - within Radford's meaning - prohibits its enforcement by This Court.

Further, purging Wilkes, for so minor an offense, committed so long ago, would affront "the principles of right and justice."[19]

CHARGE 2

Facts

The Committee transcript shows:

March 4, 1959 Wilkes was summoned to appear to answer a Charge that his failure to return $600.00, to an adversary party, breached an escrow agreement and amounted to a conversion of the funds.

The Notice, word for word, read:

CHARGE NO. 2

Facts

5. On August 15, 1958, you caused a summons in a paternity proceeding under the New York City Criminal

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19. Theard v. U.S., supra, fn 18; Selling v. Radford, supra, fn 1 Schware v. Bd. of Bar Examiners, supra, fn. 3.

Court Act to be served upon Samuel Post on behalf of your client, Mrs. Barbara Patterson.

6. On August 20, 1958, William B. Dunne, Esq. an attorney representing Mr. Post, had a telephone conversation with you and sent you a letter and a check for $600.00. The letter reads in part, as follows:

> "I now enclose my client's check payable to you in the amount of $600.00. The proceeds of this check should be held by you in escrow pending receipt by me of a general release from your client to mine, and dismissal of the present action with prejudice to its renewal."

7. Following the receipt of Mr. Dunne's letter and the check for $600 you sent Mr. Dunne a letter dated August 26, 1958, which read as follows:

> "The $500.00 advance by Mr. Post will be applied to the preservation of the moral and material welfare of Mrs. Patterson and the unborn child."

8. Following the receipt of your letter of August 26, 1958, Mr. Dunne in a telephone conversation with your

demanded the return of the $600 and in a letter sent to you on September 3, 1958, repeated the demand.

9. You have to date failed to return any part of the $600.00 received by you to be held in escrow and have converted it to your own use.

Charge 2 was not amended at any stage of the ensuing Committee hearings.

The evidence taken was concerned, solely, with whether Wilkes was obligated to return the deposited funds to the adversary party who had complained to The committee - and whose complaint underlay the Charge. (GCT-129)

Wilkes' client did not complain against him - did not appear and testify at the hearings, though she furnished an affidavit, made part of the record, saying all the adversary's accusations,[20] made to The Committee, were

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20. The adversary party wrote a series of letters to The Committee accusing Wilkes of anti-semitism, blackmail, seduction and the like. (GCT-184-191, 254-256).

unfounded and that "Lastly, in regard to Mr. Wilkes' refusal to return the money, Mr. Wilkes' letter of September 15th to the Bar Association states the facts correctly." (Resp's Ex L-1)

When Wilkes sought to persuade The Committee to assist in securing his client's appearance, to give testimony which might be important "in an attempt to elicit all the facts...", he was told to look to his own devices - that no assistance would be given - that her appearance, or not, was his responsibility, no The Committee's (GCT-197-199)

Indeed, The Vice-Chairman admonished him, at the outset of the Charge 2 phase of the hearings, that "We have only got a very simple issue here, whether there was money deposited with you in escrow under certain conditions, and whether, if you didn't comply with those conditions you should have returned the money, and in spite of that you did not." (GCT-132)

The Vice-Chairman intervened, again, at a later time to remind Wilkes not to inquire into the collateral charges, further, because "All we are concerned with here...is the question of the failure to return the money

which was sent to you in escrow...The one thing we are concerned with, and the only thing you are charged with in this second charge...is the fact that you received money under an escrow agreement, which was in writing, and the charge is that without any modification of that escrow, you refused to return the money. That is the charge and I think you will clarify things and simplify them if you address yourself to that charge. (GCT-254-255)

As the hearings neared conclusion, Wilkes resumed his efforts to obtain his client's attendance, as a witness, and the Vice Chairman fumed: "I think you have had all the opportunity for bringing Miss Patterson, here that you are entitled to get, and we will have to go ahead and reach our conclusions without her"..."I don't think she has a vital bearing on the case, as a matter of fact." (GCT-352-353)

The last day, Wilkes departed the hearing room.

A brief "off the record" discussion took place and The Vice Chairman announced: "The members of the committee present and voting, vote unanimously to

recommend to the Executive Committee prosecution of the respondent...on all three charges." (GCT-425-426)

Referee's Hearing

The Charge 2 referred to The Referee, as far as the New York record shows, was unchanged, i.e. that Wilkes had not returned $600.00 to an adversary party, contrary to an escrow agreement.

There, the only witnesses were the adversary party, Post, his attorney, Dunne, and The Grievance Committee's Attorney, Reynolds.

Dunne's testimony, capsulized, was that he had delivered $600, subject to escrow - that the terms were not kept - and that the money had not been returned, on demand. (RT-39-57)

Post testified that he had not recovered his money but he was suing Wilkes for it.[21] (RT-58-59)

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21. Post sued Wilkes, alleging conversion, on the advice of The Attorney For The Grievance Committee, Reynolds, to whom Post wrote, May 15, 1959, declaring: "Just a line to let you know I have now taken your advice and instituted private action against . . . Wilkes for recovery of my money . . . If I could repay you for your efforts, it would make me happy." (GCT-387-388, Resp Ex Q)

Reynolds testified, perfunctorily, to identify certain Exhibits. (RT-89-95)

The Referee was satisfied that he had inquired into Charge 2, sufficiently, when he verified that "Wilkes did not give Dunne back the six hundred dollars...After demand made upon him." (RT-96)

He excluded The Grievance Committee transcript from evidence, grumbling "I don't want to read this entire record." (RT-87)

There was no intimation, at any time, from The Referee, The Prosecutor or The Witnesses, that the disputed funds belonged to Wilkes' client - and that his non-return of them wronged her.

NEW YORK DISBARMENT ORDER

The first Department's disbarment order[22] recited that Wilkes "is charges with converting and misappropriating of client's finds...(and) The evidence adduced amply established that...(he) violated the terms of an escrow

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22. Matter of Wilkes, 201 NYS2d 524 (1960).

agreement by misappropriating funds which rightfully belonged to his client."[23]

Of course, nowhere, in the New York record, was a charge made that Wilkes converted and misappropriated a client's funds - nor was any evidence introduced to support such a charge, had it been made.

The First Department's confusion was enormous - and inexplicable.

CHARGE 2 LAW

On the facts of Wilkes' case, all Radford's prohibitions - against derivative enforcement of disciplinary actions - operate to save him against removal from This Court's Bar on the basis of his state court, Charge 2 conviction.

Intrinsic consideration of the underlying record establishes (1) that he had no notice he was to be tried for taking a client's funds (2) that there is no evidence,

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23. Ibid.

at all, that he committed such an offense and (3) that the state court proceedings were defective for "other grave reasons."

Want of Notice

It is indisputable that Wilkes was charged with a wrong done an adversary party, not his client - that he sought to procure his client's attendance but was rebuked by The Vice Chairman who added "I don't think she has a vital bearing on the case, as a matter of fact." (GCT-353) - that, at no time, did he have any warning that he stood in danger of a conviction for "converting and misappropriating" her funds - that The Vice Chairman, repeatedly, assured him the sole concern of The Committee (GCT-254-255) - the "simple issue" presented (GCT-132) - the "only charge" made (GCT 254-255) was whether he was obligated to restore an adversary party's funds pursuant to an escrow agreement.

Of course, if he had had any inkling that he was to be convicted of harming his client, in any way, he

would have demanded that she be called by the prosecution to testify and be cross-examined.

There is no room for rational debate.

Wilkes was denied procedural due process for want of notice.[24]

The controlling law is brightlined.

Ruffalo,[25] expanded and applied Radford, to hold:

That due process requires that a lawyer, prosecuted for alleged misconduct, must be informed of the specific nature of the charge before the proceeding begins:

That, accordingly, a State Court, disciplinary sanction is disqualified for Federal Court acceptance upon a showing that the accused lawyer was convicted on a charge not timely made - or not made, at all.

Ruffalo, simply, imported into quasi-criminal disciplinary proceedings a categorical imperative of fairness which The Court restated, without a Dissent, in

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24. Selling v. Radford, supra, fn 1.

25. In Re Ruffalo, 390 US 544, 88 SCT 1222, 20 L.Ed2d 117 (1968).

Dunn[26], viz that to uphold a conviction on a charge...neither alleged...nor presented to a jury at trial offends the most basic of notions of due process" - that "Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused."

Unarguably, Wilkes was convicted on an unmade, untried charge.

Ruffalo precludes This Court's enforcement of his proscription in New York and Florida.

Infirmity of Proof

The evidence, in the state court record, does not support Wilkes' conviction for converting a client's funds.

Infirmity of proof, in the The Radford sense, therefore, forecloses Federal Court enforcement of his State Court proscription.

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26. Dunn v. U.S., 442 US 100, 99 SCT 2190, 60 L.Ed2d 743 (1979).

Moreover, the infirmity, in Wilkes; case, is of constitutional magnitude in that he was tried and convicted in quasi-criminal prosecution where the record contains no evidence, at all, of quilt.[27]

Other Grave Reason

There are many "other grave reasons" why his Florida Bar expulsion should not be given credence.

Three of them are: (1) disparate punishment (2) prosecutorial misconduct and (3) avoidance of conflict with The Eleventh Circuit.

Wilkes' indefinite suspension for the offenses involved - assuming, arguendo, their commission - was disparate, to the point of irrationality.

The Florida Supreme Court had never before - and has never since - imposed such a sanction for such misconduct.

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27. Thompson v. City of Louisville, 362 US 199, 80 SCT 624, 4 L.Ed2d 654 (1960).

The disparity can be best illustrated by contrasting the treatment given Wilkes - and the treatment given some of his Law School peers.[28]

In Hathaway,[29] a Complaint charged that, during the period 1956-1958, a lawyer misappropriated $2,767.25 belonging to a corporate client - misappropriated $23,400.00 in funds belonging to an estate - refused to furnish an accounting for funds - cashed $16,000,00 in bonds belonging to a client and misappropriated $9,000.00 of the proceeds, etc.

He was convicted on all charges.

He was suspended for two years.

In Jacobson,[30] a lawyer who prosecuted The Florida Bar's case against Wilkes - though they attended

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28. Wilkes attended Stetson two years but graduated at Florida. he adverts, here, to his Stetson peers.

29. Florida Bar v. Hathaway, 145 So.2d 483 (1962).

30. Florida Bar v. Jacobson, 261 So.2d 815 (1972).

Stetson, together - was charged with (1) mishandling client's affairs (2) converting $500.00 in escrow funds (3) altering a mortgage to secure a loan in an amount greater than the value of the property mortgaged and (4) charging an excessive fee.

He was suspended for two months.

In Ragano,[31] a lawyer - known to Wilkes at Stetson- applied for reinstatement after suspensions for a criminal conviction.

Simultaneously, he was the respondent in a disciplinary proceeding charging, inter alia, that he had refused to return $30,000.00 in funds held in trust for a client - had commingled funds - had maintained improper Bank accounts - and kept faulty records - sought to exact an unauthorized excess fee, etc.

For the fresh misconduct he was suspended for three months followed by two years probation.

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31. Florida bar v. Ragano, 402 So.2d 401 (1981).

His reinstatement Petition - seeking to cure the consequence of his old misconduct - was granted - but deferred three months to allow for expiration of his concurrently ordered second suspension.

Wilkes is pleased that The Florida Supreme Court, habitually, is lenient in meeting our discipline - and that the justice dispensed to Hathaway, Jacobson and Ragano was in keeping with that dispensed to all Florida lawyers unless their offenses be atrocious.

He simply, submits he was not treated even handedly - which, perhaps, was attributable to unarticulated factors.

Enforcement of a sanction so drastic and disproportionate would not be obedient to Radford's Commandment that disbarment be avoided unless "constrained" by "principles of right and justice."

Prosecutorial Misconduct

The New York record shows:

That the charges filed and prosecuted against Wilkes before The New York Grievance Committee - were filed and prosecuted by a lawyer, named Reynolds, who

entertained angry feelings towards Wilkes because of a confrontation between them, earlier; (GCT-376-391)

That Reynolds' behavior evidenced a greater zeal for doing in Wilkes than doing justice; (GCT-376-391)

That the charges against Wilkes were so trifling and unfounded that it is apparent they would not have been made the subject of a disciplinary proceeding but for Reynolds' enmity;

That, further, the adversary party whose complaint resulted in Charge 2 against Wilkes wrote a series of letters to The Grievance Committee accusing Wilkes of a catalogue of villainies including anti-semitism. (GCT-184-191, 254-256, 388-389)

The Florida record shows:

That Wilkes was twice put to trial before a Referee who considered his intellectual and religious unorthodoxy so abominable as to be "incompatible with the reputable practice of the law."

The District Court, in Ruffalo,[32] deemed prosecutorial misconduct to constitute "other grave reason" for disapproval of a state court excommunication.

Can it be said, upon "intrinsic consideration:, that the New York and Florida records verify Wilkes was tried and condemned, impartially?

Federal Court

Unity

In Ruffalo,[33] the District Court refused to recognize a state court disbarment.

The Sixth Circuit,[34] contrariwise, enforced it.

The District court vacated its original Order and entered another consistent with The Sixth Circuit's for the sake of seemliness.[35]

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32. In Re Ruffalo, 249 F.Supp 432 (N.C., Ohio, 1965).
33. Ibid.
34. In Re Ruffalo, 370 Fed 2d 447 (6th Cir., 1966).
35. In Re Ruffalo, supra, fn 25, see footnote one. The Supreme Court, of course, reversed The Sixth Circuit.

In Gordon,[36] a District Court, similarly, deferred to The Tenth Circuit.

Wilkes is in good standing before The Eleventh Circuit.

This Court might consider that Court's imprimatur sufficient to vouch for Wilkes.

CONCLUSION

Wilkes' Charge 1 conviction was infirm of proof and disproportionate in punishment.

His Charge 2 conviction was on a charge, neither noticed nor tried - was infirm of proof - and was punished, excessively.

Even assuming, for the sake of argument, that both charges were, properly, made and supported by the evidence - which Wilkes denies - the "nature of the offenses" was so minor - and they were committed so

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36. Matter of Gordon, 640 Fed 2d 1143 (10th Cir, 1981).

long ago - that This Court's striking of wilkes from The Roll would conflict with the duty not to disbar except where "contrained by" the "principles of right and justice."

Respectfully submitted,

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(904) 353-5786
Attorney for Petitioner

EXHIBIT V

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

GREER'S REFUSE SERVICE, INC.,

Plaintiff,

-vs- CASE NO. 83-825 Civ-J-14

BROWNING-FERRIS INDUSTRIES, INC., and BROWNING-FERRIS INDUSTRIES OF FLORIDA, INC.,

Defendants.

_____/

ORDER

By Order entered April 8, 1986, the Florida Bar was requested to file in camera with the Clerk of this Court the complete record in its disciplinary proceedings against Donald E. Wilkes so that the Court might give "intrinsic consideration" of that record as required by the opinion and mandate of the Court of Appeals. See Greer's Refuse Services, Inc. v. Browning-Ferris

Industries of Delaware (Appeal of Donald E. Wilkes), 782 F.2d 918 (11th Cir. 1986).

The record has now been filed; and, in the meantime, counsel for Mr. Wilkes has filed a motion for an "Order Reinstating Wilkes and Establishing Procedure For a de novo Hearing."

We read the opinion of the court of Appeals, supra, to apply Rule 2.04(b), M.D. Fla. Rules, as effecting a stay of Wilke's suspension as a member of the bar of this Court pending "intrinsic consideration" of the Florida Bar record. Accordingly, to the extent that his pending motion seeks temporary restoration of his right to practice in this Court"...to resume prosecution of the above cause, "it is **GRANTED**. Mr. Wilkes may resume, with Plaintiff's consent and pending further Order of the Court, his prosecution of this case as Plaintiff's counsel of record.

However, to the extent that the pending motion seeks a de novo hearing during which evidence would be taken anew with respect to the causes of Wilkes' suspension by the Supreme Court of Florida, or with respect to rehabilitative or exculpatory matters, it is

DENIED. The "intrinsic consideration" which this Court is required to give the record in the state court proceedings is just that -- intrinsic. Under the seminal authority of Selling v. Bradford, 243 U.S. 46, 37 S.Ct.377, 61 L.Ed. 585 (1917), such intrinsic consideration has been defined as an examination of the State record to determine (1) whether the respondent in the state proceeding was afforded due process in terms of notice and an opportunity to be heard; (2) whether there was "such an infirmity of proof" that the conclusion reached by the state cannot be accepted; and/or (3) whether there is some other "grave reason" why the state court result should not be accepted. There is no requirement and no present justification for conducting any hearing for the purpose of going beyond the state court record which is now before us.

Accordingly, Wilkes may have twenty (20) days within which to show cause, by written pleading or memorandum, why this Court should not, by reason of one or all of the three factors mentioned in the preceding paragraph, suspend him from further practice of law before this Court due to his previous suspension

from practice by the Supreme Court of Florida through its order and opinion in The Florida Bar v. Wilkes, 199 So.2d 472 (Fla. 1967). The Court will then decide the issues presented with or without such additional proceedings or hearings as the Court shall then deem necessary.

The Clerk is directed to permit Mr. Wilkes and his counsel of record full access to the state court record filed in camera.

IT IS SO ORDERED.

DONE and **ORDERED** at Jacksonville, Florida, this 19 day of June 1986.

WM. TERRELL HODGES
CHIEF UNITED STATES
DISTRICT JUDGE

HOWELL W. MELTON
UNITED STATES DISTRICT JUDGE

SUSAN H. BLACK
UNITED STATES DISTRICT JUDGE

EXHIBIT VI

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT COURT
JACKSONVILLE DIVISION

GREER'S REFUSE SERVICE, INC.

Plaintiff,

-vs- CASE NO. 83-825 Civ-J-14

BROWNING-FERRIS INDUSTRIES OF DELAWARE and BROWNING FERRIS INDUSTRIES OF FLORIDA

Defendants.

_____/

ORDER

The Defendants, through their counsel of record, have filed a motion seeking the entry of an order disqualifying Mr. Donald E. Wilkes, one of the attorneys of record for the Plaintiff, and suspending him from nay further practice of law before this Court. The motion was made pursuant to Rule 2.04(b), M.D. Fla. Rules, and

although it was not precisely the type of motion contemplated by the Rule, the Court determined that the issue presented should be considered by a three judge panel. Accordingly, such a panel was convened.

I.

On June 21, 1960, the State of New York disbarred Mr. Wilkes from the practice of law in that state on the grounds that he misappropriated client's funds, communicated directly with a party represented by counsel to negotiate a settlement, and mis-advised a client in obtaining a void decree. In Re Wilkes, 11 App. Div.35, 201 N.W.S.2d 524 (1960). In 1963, the Florida Bar commenced proceedings to disbar Wilkes in Florida; and on April 19, 1967, the Florida Supreme Court suspended Wilkes from the practice of law but declined to do so for the period of time requested by the Bar. The Florida Bar v. Wilkes, 199 So.2d 472 (Fla. 1967), cert. denied, 390 U.S. 983, 88 S.Ct. 1104 (1968). Rather, the suspension was to continue until such time as Wilkes could demonstrate to the Florida Bar and to the Court that he had rehabilitated himself. Id. The Court

premised its suspension on the first two grounds cited by the New York court. Id., 199 So.2d at 473. Subsequently, on June 28, 1967, the Florida Supreme Court denied Wilkes' motion for reinstatement to active status. The Florida Bar v. Wilkes, 200 So.2d 177 (Fla. 1967). Wilkes has remained suspended from practice in Florida to date; indeed, he has not again petitioned the Florida Supreme Court for reinstatement and he is not presently a member in good standing of the organized bar of any state.

In 1971, Wilkes petitioned the United States District Court for the Southern District of Florida to confirm his credentials to practice before that Court. The Court considered the petition as one for reinstatement and dismissed it, apparently assuming that the state suspension had operated to automatically suspend Wilkes from practice before the District Court. Therefore, the Court stated, it "was appropriate to abstain until Wilkes filed a petition for reinstatement with the Florida Supreme Court." In Re Wilkes, 494 F.2d 472, 475 (5th Cir. 1974). On appeal, the Fifth Circuit noted that the Local Rules of the Southern District in force at the

time of the Florida Supreme Court action did not provide for such automatic suspension, and consequently reversed on the ground that the District Court erred when it assumed that federal bar suspension flowed automatically from state suspension. Id. at 476. The Court of Appeals instructed the District Court to treat the motion as one for confirmation of credentials, and it directed the District Court to make its own determination whether Wilkes should be suspended from practice before the Southern District after giving "intrinsic consideration" to the New York and Florida decisions. Id.

On remand, the District Court adopted the findings of the Grievance Committee which it appointed to examine Wilkes' qualifications to practice and granted the petition to confirm credentials. In Re Wilkes, Case No. 71-1214 Civ-WM (Order of August 10, 1978). No appeal of that decision was prosecuted.

II.

Since the August 10, 1978 Order of the United States District Court for the Southern District of Florida,

Wilkes has apparently believed himself able to practice law in all Federal District Courts in this state.[1] Being of a contrary view, the Defendants filed the motion currently before the panel. The precise issue confronting the panel, then, is whether Mr. Wilkes shall be allowed to continue to practice in the Middle District of Florida.

It cannot be gainsaid that federal courts are empowered to determine the fitness of attorneys to practice before them. E.g. Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274 (1957). Indeed, Title 28, United States Code, Section 1654 expressly authorizes the federal courts to make rules governing the admission of counsel to practice. The general practice utilized by

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1. Indeed, it appears the Clerk of this Court erroneously issued Wilkes a Certificate of Good Standing in 1974 although he had been suspended from further practice in this District in 1967. Additionally, on July 19, 1984, the Eleventh Circuit Court of Appeals admitted Wilkes to practice before that Court.

the District Courts, however, is that a lawyer gains admission to a federal court by way of admission to state court, most often by order of the highest state court. See Theard, 77 S.Ct. at 1276, n. 1. Such is the case in this District under both Local Rule 2.01, which is now the force, and former Local Rule 3(b), which was in effect at the time of Wilkes' state suspension.

The rationale for such derivative admission practices is easily grasped. There is simply no federal mechanism in the District Court for determining an appicant's fitness to practice law before it; consequently, District Courts typically relay on prior admission to the bar of the state as evidence of some acceptable level of professional competence and integrity. In the Matter of Roberts, 682 F.2d 105, 108 (3d Cir. 1982). Quite apart from the administration of bar exams (which might conceivably be duplicated in this court), The Florida Bar conducts extensive background investigations of applicants for admission; and, following admission, finances and maintains an extensive program relating to client security and professional discipline. Moreover, derivative admission protects the public interests

because admission to both bars allows an attorney to carefully consider with personal detachment the proper forum when analyzing a client's case rather than of necessity pursuing the claim only in the federal court. Id.

Wilkes makes much of the fact that this court, like all federal courts, retains independent control over admission, discipline and disbarment of attorneys who seek to practice before it. See In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 1224 (1968). However, once the policies animating derivative admission are understood, it is clear that the primary purpose of the Local Rules governing admission, discipline and disbarment is to permit the court to demand and enforce higher, not lower, standards of professional competence than might otherwise be tolerated.

The stark, ultimate fact is that Mr. Wilkes seeks to continue practicing in the Middle District without meeting the requirement of a resident attorney that he be a member in good standing of the Florida Bar. Local Rule 2.01, M.D. Fla. Rules. In fact, as previously noted, Wilkes has not petitioned the Florida Supreme Court for

reinstatement and is not presently a member in good standing of any state bar. Nor does he here challenge the 1967 findings of the Florida Supreme Court.[2] By necessary implication, then, the premise of Wilkes' position is that the Court should either waive altogether any minimum standard of competence, such as that insured by the Florida Bar admission and disciplinary process, or determine for itself his fitness to practice before it without regard to his current suspension in this state.[3]

These alternatives are neither consistent with the Local Rules nor mandated by existing precedent. To the contrary, state disbarments and suspensions are entitled to great respect in the federal courts, In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968), and should be relied

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2. Despite the Court's Order that he do so, Wilkes has not supplied the Court with the record of the New York or the Florida disbarment proceedings.

3. This seems so whether the Court views Wilkes' response to the motion to disqualify as a petition for confirmation of credentials or as a petition for reinstatement. Compare In Re Wilkes, 494 F.2d 472 (5th Cir. 1974).

upon if the state action meets three requirements: (1) the state must have given the attorney notice of the charges and an opportunity to be heard; (2) the evidence must support the findings made; and, (3) there must be no other "grave reason" for ignoring the actions taken. Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377 (1917); In Re Dawson, 609 F.2d 1139 (5th Cir. 1980); Wrighten v. United States 550 F.2d 990 (4th Cir. 1977).

Here, Mr. Wilkes has not contested the procedural validity of the state proceedings nor has he controverted the accounts of the facts relied upon by the state courts in reaching their disbarment decisions. Significantly, the opinion of the Southern District which confirmed Wilkes' credentials and upon which Wilkes relies so heavily here, does not question the procedural or substantive correctness of the Florida Supreme Court's decision. Additionally, as noted earlier, Wilkes has not supplied this Court with the record of either the New York or the Florida proceedings; but the Court's own examination of the opinions of the Florida Supreme Court reveals that the requirements of Selling v. Radford have been met.

The record before the panel is completely devoid of any meritorious reason for allowing Mr. Wilkes to continue practicing law before this Court. To permit him to do so would engage this Court in admission and discipline practices contrary to those contemplated in the Local Rules as dictated by practicality and comity, and would take this Court down a path it does not wish to follow.

The motion to disqualify Mr. Donald E. Wilkes from further representation in this case is GRANTED. Similary, the motion to suspend Mr. Donald E. Wilkes from the further practice of law in the Middle District of Florida is GRANTED and the Clerk is directed to strike his name from the list of attorneys currently authorized to practice in this District.

IT IS SO ORDERED.

DONE and ORDERED this 9 day of April, 1985.

WM. TERREL HODGES
CHIEF UNITED STATES
DISTRICT JUDGE

HOWELL W. MELTON
UNITED STATES DISTRICT JUDGE

SUSAN H. BLACK
UNITED STATES DISTRICT JUDGE

EXHIBIT VII

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GREER'S REFUSE SERVICE, INC.,

Plaintiff,

-vs- CASE NO. 83-825 Civ.-J-14

BROWNING-FERRIS INDUSTRIES, INC., and BROWNING FERRIS INDUSTRIES OF FLORIDA, INC.

Defendants.

_____/

ORDER

The Defendants, through their counsel of record, have filed a motion seeking the entry of an order disqualifying Mr. Donald E. Wilkes, one of the attorneys of record for the Plaintiff, and suspending him from any further practice of law before this Court. The motion was made pursuant to Rule 2.04(b), M. D. Fla. Rules.

Accordingly, the Honorable Susan H. Black, as the presiding judge in this case, brought the motion to my attention as Chief Judge because of the provision of the Rule that matters arising under it ". . . shall be heard and determined by the Chief Judge of the Court sitting with any two or more of the other judges of the District as the Chief Judge shall designate." Although the present motion does not fit nicely within the description of those to be heard by a panel of three judges under the Rule, it is otherwise appropriate and entirely in keeping with the spirit of the rule that it be heard and determined in that way.

Accordingly, the pending motion for disqualification will be considered and determined by a three judge panel of this Court consisting of the Honorable Howell W. Melton, the Honorable Susan H. Black, and myself as Chief Judge. A hearing on the motion will be scheduled by separate notice.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 12 day of January, 1984.

CHIEF UNITED STATES
DISTRICT JUDGE

EXHIBIT VIII

UNITED STATE DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GREER'S REFUSE SERVICE, INC.,
Plaintiff,
-vs- CASE NO. 83-825 CIV-J-14
BROWNING-FERRIS INDUSTRIES,
INC., and BROWNING-FERRIS
INDUSTRIES OF FLORIDA, Inc.
Defendants.
_____/

MEMORANDUM IN OPPOSITION TO BFI's
MOTION TO SUSPEND AND DISQUALIFY

Preface

The Motion To Suspend and Disqualify Wilkes signifies that B.F.I.'s Attorneys "play hardball."

Wilkes is disadvantaged.

He has neither the talent, temperament nor inclination to be a "hardballer".

He things, in truth, that "hardballing", certainly, menaces civility in the Courtroom - and may tend to render the practice of law a kind of blood sport.

The Motion's Argument

The Motion, in words or effect argues:

That This Court should require Wilkes to demonstrate why his good standing in The Middle District should not be revoked in contemplation of the disciplinary action taken against him in New York, and derivatively, in Florida;

That the Fifth Circuit's pronouncements in Wilkes' case has no relevance to his Middle District status;[1]

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1. 494 Fed 2d 472 (5th Cir 1974).

Wilkes' Contentions

That, further, neither comity, collateral estoppel, nor any other adequate legal resason enjoins This Court to defer to The Southern District's prior ajudication of Wilkes' right "to practice law before The Frderal Courts in this State."[2]

Wilkes contends:

That The Fifth Circuit's decision was founded on more than a technicality;[3]

That Judge Wisdom's Opinion took pains to chronicle Wilkes' troubles with The New York and Florida Bars--most especially the grotesqueries which may have tainted the proceedings in both States, that is; the charge, in New York, that he was an anti-Semite and the charges, in Florida, that he was irreligious and a "believer in Existentialism, a philosophy of radical individualism incompatible with the reputable practice of the law;"

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2. See the decision of the Southern District, en banc, annexed, marked Exhibit A.
3. Supra, fn 1.

That, indeed, The Court's reversal and remand, accompanied by an order that he be restored to The Southern District Bar, pendente lite, was tantamount to provisional vindication of Wilkes' claims on the merits.

That, The Southern District's trial de novo of Wilkes' cause spoke to his qualifications to continue to "practice law before the Federal Courts in this State"--not the Southern District, alone;[4]

That, in all events, This Court, as a matter of comity, should honor the Southern District's adjudication and decline to compel Wilkes to relitigate his qualifications in The Middle District.

Southern District's Adjudication

Wilkes was admitted to The Southern District, in 1950--and grandfathered into The Middle District.

He filed his Petition To Confirm his Federal Bar Credentials in The Southern District on the understanding that the determination made, there, would be dispositive in The Middle District as well.

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4. Supra, fn 2.

His Petition was dismissed but The Fifth Circuit reversed and ordered that he "be entitled to practice . . . pendente lite."[5]

On remand, The Southern District appointed a Grievance Committee to conduct an inquisition into Wilke's "qualifications to practice in the Southern District of Florida."[6]

December 30, 1977, The Committee concluded, after a trial de novo, that "we believe there now exists no present basis for holding Mr. Wilkes disqualified from continuing to practice law before the Federal Courts in this State."[7]

August 2, 1978, The Southern District, sitting en banc, entered an Order declaring that "this Court concurs in the Committee's conclusion and GRANTS Wilkes' Petition to confirm credentials."[8]

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5. Supra, fn 1.
6. Supra, fn 2.
7. Supra, fn 2.
8. Supra, fn 2.

Wilkes' Refusal to Apply For Florida Bar Reinstatement

Wilkes has never applied for reinstatement to The Florida Bar.

B.F.I.'s citation to such effect is misleading.[9]

At the outset of its serivative prosecution, in 1963, The Florida Bar refused to accept Wilkes' annual dues--the effective result of which was to suspend him, peremptorily--notwithstanding that The Integration Rule made no provision, therefore.

Wilkes petitioned The Supreme Court to compel acceptance of his dues, pendente lite.

The Court, obliquely, avoided confronting the issue by inaction for four years, until 1977, when final determination, on the merits, of the proceedings against Wilkes mooted the Petition.

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9. The Florida bar v. Wilkes, 200 So.2d 177 (FL, 1967).

Then The Court dismissed the Petition and admonished Wilkes to apply for reinstatement in the usual way.

He refused.

Conclusion

The Southern District has adjudicated Wilke's Federal Bar Credentials and comity precludes their relitigation in The Middle District.

The Motion to Suspend and Disqualify should be denied.

Respectfully submitted,

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904/374-8458

EXHIBIT IX

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GREER'S REFUSE SERVICE, INC.,
A FLORIDA CORPORATION
Plaintiff,
-vs- CASE No. 83-825-Civ-J-14
BROWNING-FERRIS INDUSTRIES,
INC., and BROWNING-FERRIS
INDUSTRIES OF FLORIDA, INC.
Defendants.

MOTION TO SUSPEND
AND DISQUALIFY PLAINTIFF'S COUNSEL

Defendants, Browning-Ferris Industries, Inc. ("BFI") and Browning-Ferris Industries of Florida, Inc. ("BFI-Florida"), move the Court, pursuant to Rule 2.04(b), Rules of the United States District Court for the Middle District of Florida, for the entry of an order suspending Mr. Donald E. Wilkes, one of the attorneys of record for plantiff, Greer's Refuse Service, Inc., from the bar of this Court and disqualifying Mr. WIlkes from further

representation of plaintiff in this action, on the ground that Wilkes has been suspended from The Florida Bar. In support of this motion, defendants state:

1. On April 19, 1967, in an action commenced by The Florida Bar, the Supreme Court of Florida suspended Wilkes from practicing law in the State of Florida until such time as he could demonstrate to The Florida Bar and to the Supreme Court that he had rehabilitated himself.

2. On June 28, 1967, the Supreme Court of Florida denied Wilkes' motion for reinstatement to active status in The Florida Bar.

3. Wilkes has never again petitioned the Florida Supreme Court for reinstatement to The Florida Bar, and, therefore, Wilkes is not a member of The Florida Bar at the Present time.

4. Rule 2.04(b) of the Rules for the Middle District of Florida provides that when it comes to the attention of the Court that a member of its bar has been disbarred or suspended by the Suprement Court of Florida, such disbarment or suspension operates as an automatic suspension of the attorney's right to practice

before the Court, subject to the attorney's right to file within 20 days a petition seeking relief from operation of this rule.

5. This motion is made to notify the Court of Wilkes' suspension from The Florida Bar.

SMITH & HULSEY

By_____
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Attorneys for Defendants,
Browning-Ferris
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and Browning-Ferris
Industries of Florida, Inc.

EXHIBIT X

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

IN RE: DONALD E. WILKES

Motion to Confirm

Credentials

NO. 71-1214-Civ-QM

_____/

ORDER GRANTING PETITIONER WILKES' PETITION TO CONFIRM CREDENTIALS

Mr. Wilkes was admitted to the Florida Bar in 1950. He was also a member of the New York Bar. In 1960, the New York Supreme court disbarred Wiles pursuant to a recommendation of a referee appointed by the Grievance Committee of the New York City Bar Association. The referee found Wilkes guilty on three charges violating the Professional Canons of Ethics (1) violating terms of an escrow agreement; (2) misadvising a client as to the validity of a Mexican divorce, and (3) directly communicating with a party represented by

counsel in an attempt favorably to influence a settlement in a personal injury action. In 1963, The Florida Bar commenced proceedings to disbar Wilkes in Florida, based upon the New York adjudication that Wilkes had been guilty of misconduct. The Florida Supreme Court rejected the first judgment of the Florida Bar's Board of Governor's recommending Wilkes' disbarment and remanded the case with directions that it be returned to the referee, appointed by The Bar, for reconsideration and recommendations as to the discipline to be imposed on Wilkes for the misconduct of which he was found guilty in New York as charged. Florida Bar v. Wilkes 179 So.2d 193 (Fla. 1965). The Court concluded that neither comity nor full faith and credit requires that the judgment in New York result in disbarment. Id. at 196. The Court held, however, that under Rule 11.02(6) of the Florida Integration Rule, the New York judgment operated as conclusive proof of guilt of the acts of misconduct adjudicated in that judgment, but that the discipline to be meted out for such acts by Florida is to be determined by the Florida

Supreme Court and its agencies in the same manner as in all other disciplinary proceedings.

Although the referee had based his recommendation primarily on the misconduct determined by the New York referee, he had also relied on Wilkes' belief in existentialism as further ground for holding him unfit to practice. The Florida Supreme Court inveighed against this ground by stating that: "Mere belief in unorthodox philosophy does not in itself make one unfit to practice law." Id. The referee had also noted the absence of any testimony by Wilkes as to church, civic and social affiliations. The Court considered that this mention required it to say that "while evidence of such activities may be offered by an accused to demonstrate moral fitness, the lack of evidence thereof may not be considered as negating fitness to practice or moral character."

Upon remand, without any further hearings, the referee considered the entire record, including that of the New York proceedings, and found that Wilkes should be disciplined in Florida for only two of the acts of misconduct (charges 1 and 3) adjudicated in New York.

The Florida Bar of Governors approved the referee's recommendation of disbarment for five years, retroactive to the date of the filing of the Florida complaint.

In 1967, the Florida Supreme Court affirmed the findings of guilt on the two charges, but concluded that disbarment for five years was not necessary to accomplish the purpose of disciplinary actions. Florida Bar v. Wilkes, 199 So.2d 473 (Fla. 1967). Thus the Court suspended Wilkes until such time as he should demonstrate to the Florida Bar and the Court that he should be reinstated to practice law. The U.S. Supreme Court denied certiorari from the judgment of the Florida Supreme Court, 390 U.S. 983 (1968).

Wilkes has never requested reinstatement to the Florida Bar, because he feels that such action would be tantamount to and admission of guilt of the charges. Instead, on August 6, 1971, Wilkes filed the subject "Motion to Confirm Credentials Before the Courts of the Southern District." The motion alleged that Wilkes was purged in Florida as a suspected intellectual and "active follower of the existentialism philosophy of radical individualism." Wilkes contended that the District court

must give "intrinsic consideration" to the New York record to determine whether in the New York proceeding there had been (1) want of due process; (2) informity of proof; (3) "other grave error that would justify federal courts' not giving effect to the New York judgment directly or indirectly." He also argued therein that the Florida proceeding cannot rise above the level of the New York proceeding.

On September 2, 1971, Judge Mehrtens entered an order taking jurisdiction of the matter. Therein the court denied Wilkes' ex parte petition for confirmation "for the reason that he failed to comply with the local rules of this court regarding suspension of attorneys, and further that his delay for filing such a petition is not sufficiently explained in his petition." Upon suggestion by The Florida Bar, the court treated Wilkes' petition not as a motion for confirmation, but rather as one for reinstatement. In making this argument, The Florida Bar assumed that Wilkes had in fact been suspended from the Southern District in 1967, immediately or shortly after his suspension in Florida. Based on this assumption The Bar argued that the

district court should abstain from deciding the merits of the petition because the petitioner then and at all times had a present right to petition the Florida Supreme Court for reinstatement. In an order entered December 16, 1971, the Court agreed that it was appropriate that it abstain until wilkes filed a petition for reinstatement with the Florida Supreme Court. The district court accordingly dismissed the complaint.

On appeal, the 5th Circuit, In Re Wilkes, Slip Op. No. 72-1399, May 23, 1974, p. 4010, held that (1) "Wilkes is on solid ground in asserting that disbarment by federal courts does not automatically flow from disbarment by state courts. Federal courts must 'determine for ourselves the right to continue to be a member of ...{the federal Bar}' after giving 'intrinsic consideration' to the underlying record." Id. at 4014; (2) "The trial court was mistaken in assuming that Wilkes ever was suspended from practice before the Southern District. We conclude, therefore, that the Court erred in treating the petition as one for reinstatement, and in deciding on that basis that it should abstain pending an application for reinstatement in Florida." Id. at 4016;

(3) "A remand will be required in this case so that the district court may hold a hearing (in effect, a de novo hearing) to conduct such an inquiry. Federal Courts must 'determine' for ourselves the right to continue to be a member of...[the federal] Bar' after giving 'intrinsic consideration' to the underlying record to verify whether 'one or all of the following ...conditions appear: (1) that, the state procedure, from want of notice or opportunity to be hear, was wanting in due process; (2) that there was such an infirmity of proof as to facts found to have established the want of fair, private and professional character as to give rise to a clear conviction on our part that we could not, consistently without duty, accept as final the conclusion on that subject; or (3) that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained to do so.' Selling v. Radford, 243 U.S. 46, 51 . . . we find no merit in [Wilkes] suggestion that we are in a

position to decided the case in full, and instead order a remand to the district court for decision on merits. We hold that Wilkes is entitled to practice before the Southern District of Florida pendente lite." Id. at 4018-19.

On December 30, 1977, the Grievance Committee submitted to this Court a detailed report concerning petitioner's qualifications to practice in the Southern District of Florida. The Committee concluded that:

> Under all the circumstances surrounding the charges the and all the evidence concerning them, the permanent disbarment of Wilkes is a more severe punishment than Wilkes' misconduct justified, and that as of this time he has been disciplined enough.
>
> Recognizing that Mr. Wilkes, in the last seventeen years, has suffered severe sanctions, and without in any way approving Mr. Wilkes' conduct, and indeed, conceding that such conduct was censorable, we believe there now exists no present basis for holding Mr. Wilkes disqualified from continuing to practice law before the Federal Courts in this State (pp. 101-02).

Accordingly, upon examining the Grievance Committee Report, this Court concurs in the Committee's conclusion and GRANTS petitioner Wilkes' Petition to Confirm Credentials.

All documents and matters from the Grievance committee relating to this matter shall be preserved as confidential, non-public record unless otherwise directed by the Court.

ENTERED at Miami, Florida, this 2 day of August, 1978.

CHIEF UNITED STATES DISTRICT JUDGE

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CHIEF UNITED STATES DISTRICT JUDGE

cc: Chairman, Grievance Committee
Nicholas Friedman, Esq.
Norman A. Faulkner, Esq.
John Fanning, Esq.
United States Attorney

EXHIBIT XI

Local Rule 2.04(b)

Whenever it appears to the Court that any member of its bar, admitted generally under Rule 2.01 has been disbarred or suspended from practice by the Supreme Court of Florida, or by any other Court of competent jurisdiction, as the case might be, or has been convicted of a felony in any court, such disbarment, suspension or convictions hall, twenty (20) days there-after, operate as an automatic suspension of such attorney's right to practice in this Court; provided, however, the attorney may file, within such twenty (20) day period, a petition, with copy served upon the United States Attorney, seeking relief from the operation of this rule, and if a timely petition is filed, suspension shall be stayed until the petition is determined. If such petition is filed by an attorney who has been admitted to practice generally under Rule 2.01 of these rules, it shall be heard and determined by the Chief Judge of the Court sitting with any two or more of other judges of the District as the Chief Judge shall designate. If such petition is filed by

an attorney who has been admitted to practice specially under Rule 2.02 of these rules, it shall be heard and determined by the judge assigned to the case in which special appearance has been made.

EXHIBIT XII

United States Constitution

Amendment V

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

EXHIBIT XIII

United States Constitution

Amendment XIV

All persons born of naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

PROOF OF SERVICE

I, WILLIAM H. MANESS, attorney for Donald E. Wilkes, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of September, 1988, I served three copies of the foregoing Petition for Certiorari on the Solicitor General, Department of Justice, Washington, D.C., 20530 by mailing said copies in a duly addressed envelope with Air Mail postage and one copy of said Petition on Honorable Richard P. Storch, U.S. Attorney, P.O. Box 600, Jacksonville, Florida 32201.

William H. Maness

Attorney